

What's Yours Is Mine – Indeterminacy in Cultural Property Restitution Debate

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Tiivistelmä/Referat – Abstract <p>Cultural property has come to have immense value to people around the world. Especially in Western nations culture has come to be represented as and by things, and nation states place a great role on iconic pieces of art from their past. However, over the course of history, vast quantities of these objects have been relocated from around the world to other nations, especially to the ex-colonialist countries. For a long time, the plundering of art has been a central part of warfare; only after the Battle of Waterloo has the general opinion begun to change towards opposing it. International law finally illegalized plunder in warfare after the immense looting campaigns by the Nazis in World War II.</p> <p>Because of this long history of plunder, and most recently the nationalistic emphasis on cultural property, recent decades have seen vast numbers of demands for restitution of cultural property into their countries and cultures of origin. However, even though there has also been a growing trend of restitution visible in recent decades, for the most part the items stay in their current locations. There is a heated debate that has been going for decades, even centuries, around this subject, but although the occasional return is made, it seems the debate does not notably progress anywhere. The debate is roughly divided into two opposing viewpoints, 'cultural nationalism', centred around the idea that cultural property belongs inherently to the nation of origin; and 'cultural internationalism', which proposes that cultural heritage belongs to humanity in general, and its allocation needs to be decided upon by other principles.</p> <p>In the thesis I study the debate over the restitution of cultural property, in order to find out why it is that the debate has continued for so long in very similar tracks, without any apparent change. I propose that the debate mirrors the argumentation structures in the theory of international law presented by Martti Koskenniemi in his work <i>From Apology to Utopia</i>. In both, the arguing parties base their case on a principle that is not inherently more preferable than the other – though in cultural property debate it is a matter of personal values, while in international law it is a question of effectiveness in the situation at hand. But in order to argue a successful case, both parties need to also use argumentation of the kind the opposing party uses. However, each argument can also be criticized for either apologetic – granting too much power and leeway to the nations, letting them act as they please – or utopian – being too idealistic and unrealizable in reality. The debate also proves that the 'nationalism' and 'internationalism' approaches are in fact not as separate from each other as they at first appear to be.</p> <p>In the debate, the rhetoric often implies an approach completely devoid of any political consideration. However, it is shown that neither side can claim to be truly apolitical, and in fact there is a great deal of politics involved in cultural property discourse overall. This also reflects the situation in international law, which has developed with the aim of separating it from politics, but is inevitably tied with it.</p> <p>The argumentation ends up being a balancing act not to lean too much into apology or utopia. This structure of discourse, which includes the way each argument can be flipped and used by the other side, upholds the debate in perpetuity, until – in international law – an external factor is brought in to decide the case. In cultural property debate, there is also the possibility of a fundamental change of perspective. I present and assess three such alternative approaches, ranging from two approaches that would fundamentally change the way cultural property is understood, to a more modest proposal of bringing internationalism and nationalism closer together. While the latter, pragmatic solution is more likely to be achieved, it also has more a risk to not bring any true change into the debate. Whether such a change is required, however, is another matter.</p>			
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Abbreviations

FTS	Finnish Treaty Series
ICOMOS	International Council on Monuments and Sites
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series

1. Introduction

Ever since I first came across the subject of cultural property in a course about law and history politics, I have discovered a world that has only come to seem more complex the further I have studied it. Earlier, I had known nothing about the complexities of the nature of the collections in the great “universal museums”¹, and about what a heated debate there was about the claims for restitution. After having studied the subject further, there was something in the back of my mind about the debate that bothered me, but I could never quite pinpoint what it was. Something about how the debate never seemed to move forward, and how the different sides of the argument were defined and how they argued in reality made it seem to me that the debate did not play out in the same way as the writers made it seem. It also puzzled me that I felt that, even despite appearing to be at the different ends of the spectrum, the different sides often argued using very similar arguments. Then a few years later, while contemplating the subject of my Master’s thesis, I was taking a course on international law and hearing about Martti Koskenniemi’s view about the indeterminacy of international law. According to it, international law has an argumentation pattern where each party takes positions opposing one another, but during the course of the discourse each party inevitably flips around the other’s argument and uses it for their own position and vice versa, theoretically *ad infinitum* – and suddenly it struck me how incredibly similar this was to the way the cultural property debate functioned. I knew I had found an angle to the thesis I had previously been missing.

Cultural property has come to have an immense value to people almost everywhere. Everyone involved in the debate – and almost everyone at least in the Western world – “have agreed to a worldview in which culture has come to be represented as and by ‘things.’”² In recent years also the intangible expressions of culture have come to be valued and protected more, but in the large scale it seems that tangible heritage is still seen as the most important manifestation of a culture.

¹ Nor had I heard of the term “universal museum”.

² Handler, 1985, p. 215

This is also why the restitution of cultural property has become such a hot topic in recent years, even decades. Nations feel that they have a right to the cultural property created by their predecessors, that it is something that is inherently theirs in both a legal-moral sense and a more cultural sense. That another state displays (and gains, for example, the advantages of tourism from) something that feels so fundamental to the first country, it creates a feeling of being wronged. The debate is heated further by the demands of the postcolonial nations hoping to claim some redress for colonialism, a time when the colonial powers heavily increased their collections of cultural objects from around the world. At the same time, the nations holding the objects feel they have the law on their side, and feel that not only are their rights being threatened just as much, but also that morally the claims from the source country are not any more justified than the holding country's right to the objects.

There has, however, been a rising trend of restitution for several decades now, perhaps even rising since the 90's. The most important change happened in 1970 with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which changed the international legal system to be more biased towards restitution in most cases – though only those that have come to being after the Convention. The trend of restitution is related to the general public view having slowly but steadily shifted in favor of the restitution movement. However, the trend has also meant that those – usually institutions – who are in possession of cultural property from other nations, have on occasion felt the need to dig their defenses even deeper, perhaps feeling overly pressured at times for restitution even when there really is no cause, all the while certain people especially in source nations have taken an overly offensive stance towards these institutions holding the objects, causing friction and impairing fruitful collaborations. It is, in other words, important that the discussion stays in good spirit.

Cultural property also touches on every nation. National museums house objects of (cultural) importance from the nations' past, and everywhere there are collections, monuments and other objects celebrating the historical, cultural and artistic achievements of the peoples. And although not all nations have been subject to the removal of their cultural property – or been the one removing them – this subject, too, can have effects in surprising places. For example, in Finland some years ago, a collection of copies from the Russian Tsarist government mainly from the 19th century was rediscovered in the

Helsinki University Library. This collection included also copies of many Hebrew language books, several of which had been lost in the many purges against the Jewish populations especially in World War II.³ In addition, not all dislocation of cultural property happens outside national borders. Even a country like Finland, whose cultural property has mainly been without interest internationally, has had its share of (systematic) internal removals of cultural property by the government, especially in the region of Karelia (though some of it was also acquired on the side of the Soviet Union).⁴

Because there is so much interest, meaning and importance invested in cultural property and its allocation, it is no surprise that there are also ways in which it is used for historical-political gains. This is something that is important to keep in mind in the discussions, and it is quite difficult to be fully separate from. Cultural property is also strongly ambiguous in its meaning, so that while for one person it means something purely aesthetic and artistic (or has no meaning at all), or perhaps celebrates the achievements and unity of humanity as a whole, to another person the same piece or its allocation might be a sign of imperialist attitudes and a display of perceived superiority.

There are countless angles one could approach the cultural property issues from, and here I can only scratch the surface. One important angle is seeing cultural property or heritage as a human right⁵ (or a community right); one could approach the problems from ethics;⁶ it is also possible to look at it from a point of view of economics and international (art) trade;⁷ or as a minority issue⁸. In addition, these are issues that touch all the corners of the world, and people in a myriad of different cultures, ways of life and social situations – and usually all of them have a different understanding of what it is that makes cultural property important, and what cultural property means in the first place.

That is also why it is vital to delimit one's approach to the subject. In this paper I am only focusing on cultural property (as defined in chapter two) as opposed to cultural heritage in general, and in cultural property I have left out, for example, human

³ Greenfield, 2007, p. 220

⁴ Arhippainen, 2009, p. 57

⁵ See for example Alderman, 2011; Mifsud Bonnici, 2009

⁶ See for example Merryman, 1998a

⁷ This is an angle that many participants in the discussion take. See for example Merryman, 1998b; Merryman, 1995;

⁸ This relates especially to indigenous peoples, such as the Native Americans and the Aborigines of Oceania. See for example Carpenter, Katyal & Riley, 2010

remains⁹ and archaeological material and focus instead on works of art – including sculptures and paintings, but also to some extent books and other manuscripts. Both of the aforementioned types of cultural property that were left out of this study would bring additional issues that could not adequately be considered in the space available here. In addition, geographically I have limited myself to European cases – either with objects that originate from Europe, or objects that are from outside of Europe but are now situated in a European state (that has been responsible for the object's extraction from the state of origin). Finally, I have (aside from some general considerations) left out items in private ownership and focus purely on objects currently located in so-called universal museums. This, again, helps focus more on the argumentation without having to bring in lengthy consideration regarding national and international regulations on private property, the rules on *bona fides* ownership and other such matters that would require a study of their own.

It seems that focused academic research of cultural property (especially the cultural property debate) is quite a recent phenomenon – only in very recent decades has there been actual methodical research put into the fundamentals of the topic. Earlier, it has usually been more purely a question of general and academic debate, but not proper scientific research. This is also why in my study there are several ambiguities and general considerations I feel I need to address before I can focus on the main questions of research.

1.1. Research questions and methodology

As something that touches on the lives of most people in the world, cultural property is certainly something of value and worth researching. It is also an area that has many ambiguities and differing values, which means that a lot more research is needed. I also feel that there is some confusion as to the nature of the discussion surrounding it. It seems that many of the participants in the debate do not understand the indefinite nature of the discussion and the rhetoric in it. Yet it is vital to understand the way the discourse works in order to get results from it.

In the thesis I study the debate surrounding the demands for restitution of cultural property. There are several cases where the debate has been going strong for decades, or even, in some extreme cases, centuries. The fundamental goal of the study is to

⁹ This especially is an area of cultural property best explored separately, as there are many rights and problems involved that are not relevant in other types of cultural property. On human remains as cultural property, see, for example, on the so-called Kennewick Man, Owsley & Jantz, 2002; Gerstenblith, 2002

find out why it is that these debates have been able to continue for so long without any conclusion or results. This will be done by studying the structure and comparing and analyzing the rhetoric involved in the argumentation between cases, and then applying the results to the theory of international law as a language as presented by Martti Koskenniemi. There are also certain contradictions and ambiguities involved in central concepts of the field, and I will attempt to clarify some of these concepts, as well as whether the different approaches to the allocation of cultural property are really as separate as they seem.

Is this a legal historical study? According to Kekkonen, the essence of legal historical research is in the analysis of legal change.¹⁰ Although actual law does not take a central stage in this study, I do not consider it a non-legal study. It deals with the structure and rhetoric of a debate that has participants from all aspects of science and the general public. Yet, at the same time, at its core are undeniably legal issues. The allocation of cultural property, like any property – as cultural property is, for the most part, currently treated – is a legal issue where the law needs to be considered even if it is not directly addressed. A good deal of the debate has also to do with reasons to potentially supersede the law – especially morality. And such a consideration needs to take the law into account. It also has a great deal to do with law and legal history in that it is a matter of power, which naturally has important legal implications. The ‘history’ part in ‘legal history’ also plays an important part in this study, as not only is the restoration argumentation always, in part, inescapably historical, I feel it is necessary to include purely historical considerations in the study to better comprehend the discourse as it is now, not only as a debate about the best allocation of the objects for their sake but also as a debate about historical (potential) injustice and its restoration. That is why this study does qualify as legal historical study. The analysis of legal change is in relation to the development of the concept of cultural property, as well as especially in the analysis of (the lack of?) change in the cultural property restoration debate, although in that sense – as analysis of a self-perpetuating discourse – this approach cannot be carried throughout the text.

Due to the nature of the thesis and its subject, it does not – and cannot – systematically follow usual legal historical methodology. Obviously this study does not fit among the purely legal methods such as doctrinal research – even if fitted to a legal-

¹⁰ Kekkonen, 1997, p. 131

historical approach – as it deals very little with the functioning of laws or the justice system. For this reason, the study is not ‘internal legal history’ – that is, “the study of legal doctrine and its processes.”¹¹

So, it seems the study is rather ‘external legal history’, the study of law in context.¹² However, the external legal history view is very inclusive and cannot on its own offer any methodology. Hence, further narrowing is needed, this time in the division of “law &” and “law as ...”, as explained by Fisk and Gordon.¹³ We can see that the study does not fit the “law &” approach, first and foremost because, again, its primary target of study is not, in itself, law, but rather the debate surrounding it. In addition, the “law &” approach has a tendency to perpetuate “the idea that, even though law is situated in society, law is distinct from society and can, or must, be studied in relation to it.”¹⁴ In the view of this study, the law is merely one aspect of the discourse. The “law as ...” view of legal history is, however, more suitable, albeit still slightly problematic. In the view of this study, the view of law is mainly “law as part (or result) of the cultural property debate”. This thesis does not, however, offer any conclusions from the nature of law itself.

But this study also includes elements that are not fundamentally legal-historical. Those aspects of the study could be included in the category of ‘socio-legal studies’ – if the term is interpreted in its widest meaning where it includes an extremely wide range of approaches from very empirically and social science oriented approaches to feminist and critical legal studies, and an equally wide range of subjects from purely legalistic studies to the views regarding law in entertainment.¹⁵ In this sense, I believe this study fits well, as it places a heavy emphasis on the view of law as a part of a larger discourse in society overall. However, this way the socio-legal studies can hardly be called methodology, but rather a loose collection of approaches to studying legally-oriented, societal subjects. If the term is defined more narrowly, closer to pure social studies, the thesis falls off the definition, as it does not follow the more empirically oriented methodology in social sciences.¹⁶ In *From Apology to Utopia*, Koskenniemi speaks of regressive analysis, investigating discourse by going backwards to its deep-structures; a deconstructive method, “a general outlook towards analysing intellectual operations

¹¹ Handler, 2013, p. 86

¹² *Id.*, p. 86

¹³ Fisk & Gordon, 2011, pp. 519-527

¹⁴ *Id.*, p. 520

¹⁵ Cowney & Bradney, 2013, pp. 35-42

¹⁶ *Id.*, pp. 35-36

through which the social world appears to us in the way it does;”¹⁷ and holism, discussing theory and doctrine as a whole.¹⁸ As my thesis relies on Koskenniemi’s work in studying in a similar manner the debate surrounding cultural property, all these depictions necessarily also fit my study – albeit that Koskenniemi has already paved a lot of the way. Though such an approach may be eclectic, I feel that it does not mean that the results of the study are any weaker. Such a style lacking a uniform method (or “style as method”) is far from unheard of, supported especially in critical legal studies,¹⁹ including Koskenniemi – not to mention that some have rejected the desirability of method altogether.²⁰

1.2. Structure

There are several complicated and ambiguous aspects in key terms in the cultural property discussion, and there is no one universal definition of them available. This is why, even though a precise definition is not possible, I will begin (after this introduction) in chapter two by explaining how I use the terms ‘cultural heritage’ and ‘cultural property’. This is followed by an explanation of two fundamental approaches towards cultural property: ‘cultural nationalism’ and ‘cultural internationalism’. In some ways, the search to define all these terms will also continue throughout the thesis.

In chapter three I will look into the birth and development of cultural property and the attitudes toward it in Europe. I will do this especially through the lens of the history of plunder of art, as many of the issues in the cultural property field are the result of the thousands of years of plunder, especially during warfare. During this chapter, I aim to trace the roots of the idea of cultural property and to better understand the idea of it and why we care about it, and to understand how the current situation of globally scattered cultural objects has come to be. The chapter will focus especially on moments in history that, when contrasted to one another, reveal change in attitudes towards the central issues and the way the different themes are viewed. The history of cultural property is not a history of sudden changes and great individuals who shape the concepts and ideas of the field. Instead, the changes are gradual, visible often only by comparing attitudes on a longer timeframe, and there are perhaps even less than a handful people who can be said to have individually had a great impact on the attitudes towards the allocation of cultural

¹⁷ Koskenniemi, 2005, p. 6

¹⁸ *Id.*, pp. 6-7

¹⁹ See for example Koskenniemi, 1997; and Minkinen, 2013

²⁰ Feyerabend, 1975

property, or who have actively and loudly campaigned for changes in attitude. Rather, the changes have appeared side by side with gradual changes in societal attitudes and morality on a large scale.

The fourth chapter focuses on the current debate. In it, I will attempt to specify the most common and most important arguments in the cultural property debate, and analyze the rhetoric as they appear in the use of these arguments. This will be done through focusing on certain high-profile cases that exemplify key elements of the different arguments and contrast the many-sidedness that these elements may have. Especially the Parthenon Sculptures case will be prominently featured due to both its massive influence as the most debated restitution case and its extremely multifaceted nature.

In chapter five, I will continue to explore certain themes that will be alluded to in the previous chapter, regarding cultural property as something beyond self-contained objects that are valued because of their inherent traits, but rather, first, as a utility for history politics (or memory politics), and second as a way of continuing traditions of imperialism. The chapter aims to show that although it is often the purported aim of those in the debate to see and have cultural property as something pure and apolitical, in truth it is impossible to separate cultural property from politics.

Chapter six will then continue to connect these previously raised points and compare them to the views of international law of Martti Koskenniemi as presented in his work *From Apology to Utopia*. First, I will briefly explain the central points of Koskenniemi's theory as it relates to international law, then in the second part I will apply the theory to the debate surrounding cultural property. I will attempt to show that, in fact, the debate surrounding the restitution of cultural property follows in great deal the same patterns as international law discourse, and attempt to find reasons for it.

After this, chapter seven will present some alternative approaches to cultural property in either its definition or attitudes towards it, as well as contemplating on their possible impacts in regards to breaking the apparently endless cycle of debate in the field now (without making assumptions on whether such a cycle is a negative thing or not). In the final chapter I will present some concluding remarks on the paper.

2. Definitions

2.1. Cultural Heritage and Cultural Property

2.1.1. *Cultural Heritage*

We often see the terms cultural “property”, “heritage”, “goods” and “objects” interchanged. There is no single, universal definition for any of these terms. Although in common parlance they generally refer to the same things, their exact definition and legal regime (alienability, exportability etc.) are to be sought in national legislation, or in international conventions.

Therefore such definitions and legal regimes vary from State legislation to State legislation, or from treaty (international convention) to treaty. Generally, the word "property" has a legal background (linked to "ownership"), while "heritage" stresses conservation and transfer from generation to generation. No particular culture-oriented connotation characterizes "good" and "object".²¹

Cultural heritage and cultural property are not simple terms. There are no exact definitions of them in law or in literature, but rather more general descriptions that leave a lot open. It could be said that there are as many definitions of the terms as there are people talking about them. According to John Henry Merryman, “[a]ny attempt at a definition will reveal that the cultural property category is heterogenous.”²² In fact, perhaps because of its multifaceted nature, especially the term ‘cultural heritage’ often goes undefined.

Cultural heritage and cultural property are on occasion used quite synonymously (especially in the early stages of the development of the terms – in the first half of the 20th century – as well as in common parlance), but in reality there is quite an important difference between them. In the most common sense of the terms, cultural property should be seen as a subcategory of cultural heritage. In short, cultural heritage includes an extremely wide variety of matters, both tangible and intangible, that are important to humanity, while cultural property is more specifically culturally important items. In the original formulations of the term, ‘cultural heritage’ was not yet really separated from ‘cultural property’, and included what we now mainly understand as specifically cultural property – that is, physical objects that have great significance to human culture²³. The idea of cultural heritage has, however, constantly grown over the

²¹ UNESCO Handbook, p. 4

²² Merryman, 2005, p. 11

²³ I use the term ‘human culture’ because in the formulations of most of the international conventions, the importance of the subject can be seen as relating to either local cultures, or of a more general view of a

decades, first including different types of physical objects, then expanding to intangible heritage, such as certain types of cultural institutions and traditions, as well as natural landscapes.²⁴

To try to explain cultural heritage and cultural property (at least in a legal sense), it is probably best to begin by looking at different international conventions and how the ideas have developed in them. Interestingly, although already the 1954 Convention for the Protection of Cultural Property During Armed Conflict (Hague 1954) refers to ‘cultural heritage’, the term is not defined in a legal document until 1964, in the International Charter on the Conservation and Restoration of Sites (Venice, 1964) – while the term ‘cultural property’ had been defined in documents decades earlier. In defining cultural heritage, Venice 1964 has the following to say:

Imbued with a message from the past, the historic monuments of generations of people remain to the present day as living witnesses to their age-old traditions. People are becoming more and more conscious of the unity of human values and regard ancient monuments as a common heritage. The common responsibility to safeguard them for future generations is recognized. It is our duty to hand them on in the full richness of their authenticity. ...

Article 1.

The concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time. ...

Article 3.

The intention in conserving and restoring monuments is to safeguard them no less as works of art than as historical evidence.²⁵

Although these passages still convey a much more narrow view of cultural heritage than today, focusing on monuments, they still portray several key points in cultural heritage. Cultural heritage is about the traditions of culture and identity of the peoples. The notion of “unity of human values” (though no doubt questionable) is also important, portraying the importance of cultural heritage to humanity as a whole, not just to those whose native heritage it is (which is also explicitly stated in Hague 1954, saying it is “of great

common culture of humanity. It is never explicitly said whether there is a preference over particular cultures or humanity in general.

²⁴ Vecco, 2010, pp. 321-324

²⁵ Venice 1964

importance for all peoples of the world”²⁶). In Article 1, it is noted that of cultural importance aren’t only the greatest pieces of art, but also more modest ones, that hold other types of significance. As said by Marilena Vecco: “[i]n this regards, mention was made of value, evaluation, evidence that are of artistic and historic interest, cultural interest and interest of cultural property.”²⁷ Article 3 expands on the values that cultural heritage holds – it is not only the artistic values that make cultural heritage important, but the way the objects act as reminders of history and sources of historical knowledge.²⁸ There is more to cultural heritage than meets the eye.

Less than a decade after the Venice Charter, in 1972, the idea and importance of cultural heritage would be solidified in the Convention Concerning the World Cultural and Natural Heritage (World Heritage Convention). The Convention does not include cultural property items in it, rather focusing on more immovable things – but still expands the category into the context and surroundings of the subject at hand. Importantly, the Charter parallels cultural heritage with natural landscapes (“natural heritage”, as the name says), revealing the gradual shift towards the intangible aspects of heritage as we understand it today.

In the following decades, the idea of cultural heritage would further develop in international documents, such as the 1975 Declaration of Amsterdam: “[a]part from its priceless cultural value, Europe’s architectural heritage gives to her peoples the consciousness of their common history and common future. Its preservation is, therefore, a matter of vital importance”²⁹, which is a further turn from not only emphasizing the scientific and aesthetic values that the heritage represents, but also the cultural identity and consciousness of the people. This social aspect culminated in the Burra Charter in 1979, which explicitly includes not only the “aesthetic, historic, scientific” values, but also the “social value for past, present or future generations.”³⁰ It also moves further away from simply listing the subjects of protection (as cultural heritage law is in great deal about the

²⁶ Hague 1954, preamble

²⁷ Vecco, 2010, p. 322

²⁸ In reality, however, it is not quite as simple as it would seem, as there is a great deal of politics involved in what these different heritage objects represent and which of them are allowed to survive in the first place. This is discussed further in chapter 5. In addition, David Lowenthal has quite persuasively argued that, in fact, heritage is the opposite of history (see in general Lowenthal, 1998).

²⁹ Jokilehto, 2005, p. 25, quoting Amsterdam Declaration, Congress on the European Architectural Heritage, Amsterdam, 21-25 October 1975

³⁰ Burra 1979, art. 1

protection of cultural heritage) and towards a system of a more subjective (though communal) recognition.³¹

Finally, the most recent inclusion into cultural heritage came in the Convention in the Safeguarding of Intangible Cultural Heritage (UNESCO 2003). As the name suggests, this convention expanded the protection of cultural heritage to not only tangible subjects, such as monuments and landscapes, but also the intangible aspects of culture:

For the purposes of this Convention,

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity...³²

This inclusion of intangible heritage was vital because of the limited importance on the material heritage in many cultures. The earlier focus on material (or even monumental) heritage was notably Eurocentric. In countries like Japan, the whole basis of the notion of heritage is first and foremost immaterial.³³ In addition to purely intangible tradition, even the attitude to monuments is very different. According to Marilena Vecco, for example for the Japanese the interest in the material is minimal, but rather they are interested in the knowledge imbued in the object’s creation:

The Japanese temple of Ise, the greatest of the temples of the Shinto religion, is made of wood and has completely preserved all its perpetuity, thanks to an identical and integral renewal process. Every 20 years, that is, generation after generation, the temple has been completely reconstructed for more than twelve centuries. The temple remains the same, using the same type of wood but it is continually renewed without undergoing any material or spiritual changes.

This approach depends on the cyclic vision of history, characteristic of oriental civilisations, which allows a sort of reversibility of time. While the western philosophical approach as regards conservation manifests itself in the preservation of the historic monument, the oriental one tries to use the monuments to preserve the very spirit they represent.³⁴

³¹ Vecco, 2010, p. 323

³² Paris 2003, art. 2

³³ Vecco, 2010, p. 324; Harrison, 2013, p. 95

³⁴ *Id.*, p. 324

All in all, it is clear that the definition of ‘heritage’ is constantly evolving and spreading into new types of representations. This means that it is also very difficult, if not impossible, to define comprehensively beforehand, but is rather a constant process of re-evaluation and reinvention. In addition, the definition of heritage must take into account not just the European view, but also the many different ideas of culture globally, that often differ greatly from those in the Western view.³⁵ Of course, the more inclusive the definition is to be, the vaguer and less helpful it also becomes.

2.1.2. *Cultural Property*

The terms ‘cultural property’ and ‘cultural heritage’ both appeared in international documents for the first time in the Hague 1954 convention, though only cultural property was given a separate definition. It was defined as “movable or immovable property of great importance to the cultural heritage of every people...”³⁶ and continues with a list of examples such as monuments, archaeological sites, works of art, books and so forth.³⁷

Arguably the most important convention in the field, the 1970 UNESCO Convention on the Means of Prohibiting Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970) was more specific in its definition of cultural property. It also brought the important aspect of each state defining for themselves which items belong to their cultural property, as long as they fit to the wide range of categories set in the article. These categories include, for example, all the traditional types of works of art, objects of historical interest and archaeological material, but also archives, collections or samples of biological or other such scientific interest.³⁸ In the convention, one can also see the emphasis on ‘property’, which further differentiates the idea of cultural property from cultural heritage – it is not only that physical things are cultural property, they really are the *property of* someone or something.

Many international documents follow among very similar lines. However, the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property has a more descriptive definition of cultural property that attempts to describe more the spirit of the subject. It also leaves the final definition to the states: “cultural

³⁵ *Id.*, p. 324

³⁶ Hague 1954, art. 1

³⁷ *Id.*; on developments before Hague 1954, see Jokilehto, 2005, pp. 4-15

³⁸ UNESCO 1970, art. 1

property' shall be taken to mean items which are the expression and testimony of human creation and of the evolution of nature which, in the opinion of the competent bodies in individual States, are, or may be, of historical, artistic, scientific or technical value and interest, including items in the following categories..."³⁹ following with a list less detailed than the one in the 1970 UNESCO convention (which is exhaustive, instead of exemplary).

2.1.3. Non-legal Definitions

Finally, the way cultural property and cultural heritage are used in academic discussion have their own nuances when compared to the international documents. For example, several writers have emphasized the rhetorical differences in the terms 'heritage' and 'property': "[i]n the debate over cultural properties, the language we use reflects our conceptions of the main issues in that debate and sets into place the sorts of remedies that are taken to be relevant to resolving that debate."⁴⁰ In this approach, the relationship between cultural heritage and cultural property is not the same as in the legal texts, but rather they usually are seen as overlapping, competing terms, the difference being in the way they are addressed. In such a case, it seems 'intangible cultural heritage' is a different category, with 'cultural heritage' its tangible counterpart, though it is rarely clearly defined. As Lyndel V. Prott says: "cultural property, in my view, necessarily carries with the phrase a whole baggage of associations and implications, in particular, the view in common law ... that property and ownership rights clearly authorize exploitation, alienation ... and exclusion of others from access – all elements that, in modern heritage law, may well be restricted"⁴¹ and argues instead for the use of the term 'heritage'. So, in short, the term 'cultural property' shows the objects being seen as a category of property alongside others, while 'cultural heritage' emphasizes the way the items are passed on through generations as something external to the view of property rights. Heritage is also more culturally inclusive, a global term, while cultural property has a distinctly Western connotation of the idea of property.⁴²

It is also important to realize that the debate is approached from many different (more or less scientific) angles – which may not always be adequately separated

³⁹ UNESCO 1976, art. 1

⁴⁰ Warren, 1999b, p. 14

⁴¹ Prott, 2005, p. 226

⁴² Prott, O'Keefe, 1992, pp. 309-312

from each other, but which bear important effect on the way the entire problem is understood and attempted to be resolved. As said by Karen J. Warren:

In important ways, the language people use reflects their conception of themselves and their world. If the language used is primarily the language of law, the conception of what counts as the relevant issues in a dispute will tend to be given in terms of what the law permits or requires. If the language used is primarily the language of morality, the relevant issues in a dispute will tend to be viewed as normative moral issues, that is, issues of right and wrong, moral rules and responsibilities, moral virtues and vices. And if the language used is primarily what some philosophers (e.g. the later Wittgenstein) refer to as “ordinary language,” or as what others might refer to as “common sense,” then the legal and ethical issues in a dispute will tend to be viewed as relevant to the extent that they do or do not get at what ordinary language or common sense dictates.⁴³

All the different languages discussed in the passage above are ways in which the debate in cultural property is often approached, though they are not, by far, the only approaches, and they each lean towards their own usage of ‘cultural property’ and ‘cultural heritage’. Often, ‘cultural property’ is strictly legal terminology.⁴⁴ Because the terms have such ambiguous meanings both in different approaches and in subjective terminology, it is important to separate the different approaches from each other, and this is also why “it is important that every scholar spells out his own usage”⁴⁵.

Although what has been described above is the generally accepted view, this has not prevented slightly varying or even completely alternative views from also emerging (and, as was suggested above, it seems everyone has their own perspective on the finer details). In addition, there have been many suggestions presented for alternative approaches towards these matters to fix certain issues that arise from the traditional views of cultural heritage and property. Some of these will be discussed later, in chapter 7. As for a strict definition, as suggested by Tatiana Flessas, “[t]he search for any definition, much less a definition that could include all kinds of claims regarding ‘cultural property’, may be mistaken.”⁴⁶ Although there are countless attempts at explaining cultural property in a way that would settle the question in a satisfactory way, “[t]he seemingly exhaustive legal definitions are the location of gaps, paradoxes, inconsistent values, and sudden switches of focus.”⁴⁷ Flessas suggests, instead, that the true essence of cultural property is not in any definition of the object (in fact the object itself can be quite meaningless), but rather in

⁴³ Warren, 1999a, p. 209

⁴⁴ Prott, O’Keefe, 1992, p. 319

⁴⁵ Prott, 2005, p. 226

⁴⁶ Flessas, 2003, p. 1095

⁴⁷ *Id.*, p. 1095

certain structures (of thinking) that attach to the object meaning about “truths” regarding, for example, culture, and life overall – though in a way that is never fully satisfactory, and that always leaves the observer looking for something more.⁴⁸

In this text, I use ‘cultural property’ in what I believe to be the most common sense – as a subcategory of ‘cultural heritage’ which includes the tangible heritage, while ‘cultural heritage’ includes also the intangibles as a very open category. I will, however, often prefer to use the term ‘cultural object’ for much the same reasons as Ana Filipa Vrdoljak, who writes that “[t]he term ‘cultural property’ places emphasis on the property law aspects of cultural expressions.”⁴⁹ However, although I am generally speaking about physical objects, for me this term also holds the possibility for a more loose interpretation of the subject, for example as a collection or theoretically as something intangible. Finally, although some recognize the terms as being value-loaded, for me terms like ‘restitution’ are primarily neutral, and much like Vrdoljak, I will use them interchangeably. I will, however, avoid such terms as ‘repatriation’ because it is a term very easily seen as making a statement on its own.

2.2. Cultural Internationalism & Cultural Nationalism

Cultural nationalism and cultural internationalism are terms developed by John Henry Merryman in his 1985 article *Thinking about the Elgin Marbles*,⁵⁰ which defines different approaches to the issue of the correct location of cultural property. According to him, there are two different attitudes that people take in cultural property. First is what he calls “cultural nationalism”, the idea that cultural property belongs in the nation of origin. The other is “cultural internationalism”, the idea that cultural property is the property of all mankind and its allocation should be decided by certain more universal principles.⁵¹ This is, of course, only a rough division of the different actors in the debate – but it is one that has been for the most part accepted as the two primary categories, even though many – including Merryman himself – have since supplemented it with finer categories.⁵²

⁴⁸ *Id.*, passim. Flessas’ views are further explored in chapter 7.

⁴⁹ Vrdoljak, 2008, p. 7

⁵⁰ Merryman, 1985. It is good to note that Merryman himself supports the cultural internationalist view.

⁵¹ *Id.*, pp. 1910-1921

⁵² See Merryman, 1998b, pp. 9-13; and for example Francioni, 2011, pp. 9-10

“Cultural property internationalism” was, according to Merryman, first solidified in an international treaty in Hague 1954. It was not a new idea, though – Merryman traces its roots to, for example, the Lieber Code, the code of conduct for the Union troops in the American Civil War, as well as the 18-19th Century French writer Quartremère de Quincy, and all the way to the ancient Greek writer Polybius.⁵³ In Hague 1954, the internationalism is exemplified in the preamble, stating:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural property of all mankind since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance to all the peoples of the world and that it is important that this heritage should receive international protection;⁵⁴

It is the emphasis on the whole of mankind that creates the difference from cultural nationalism. Internationalism cares primarily about other things than the original “nationality” of the object. In situations where there case for return is not legally and morally clear, “Merryman advances three internationalist principles - preservation, integrity, and access - that assist in determining the appropriate allocation of cultural property”.⁵⁵ Preservation means protection of the object from damage or destruction. Speaking of the Elgin Marbles, Merryman states, that “[i]f the Marbles are destroyed, people of all cultures will be deprived of an important part of their cultural heritage” and “damage short of destruction ... threatens the same value.”⁵⁶ Integrity is also quite self-explanatory: any work of art or other cultural object should be as intact and whole as possible – the object loses value (aesthetically, scientifically or monetarily) if some of it has been separated.⁵⁷ Finally the third principle, distribution and access, is about the availability of the pieces. This principle holds that since cultural property is important to all the peoples of the world, cultural property should be available all around the world, “so that all of mankind has a reasonable opportunity for access to its own and other people’s cultural achievements.”⁵⁸

Cultural nationalism, on the other hand – as defined by Merryman – emphasizes the national right to cultural heritage. According to Christine K. Knox,

⁵³ Merryman, 2005, pp. 13-18; Merryman, 1986, pp. 834-836

⁵⁴ Hague 1954, preamble

⁵⁵ Sljivic, 1998, p. 414

⁵⁶ Merryman, 1985, p. 57

⁵⁷ *Id.*, p. 58

⁵⁸ *Id.*, p. 59

“cultural nationalism views cultural heritage as nation or state specific, and therefore assumes that cultural property rightfully belongs in its country of origin.”⁵⁹ For Merryman:

In its truest and best sense, cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community.⁶⁰

However, Merryman is, in the end, very skeptical of this side of cultural nationalism, saying that in practice it is, in fact, usually merely a tool for nations to argue for their own personal gain and retentionist policies.⁶¹ He also reminds, that “[i]t is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government of a nation should have power over artifacts historically associated with its people or territory.”⁶²

According to Merryman, cultural nationalism’s most important legal manifestation is the UNESCO 1970 convention. Cultural nationalism itself is traceable to the rise of nationalism in general.⁶³ Although it had been already present in earlier conventions, UNESCO 1970 is prominent in this regard due to its importance in the field of cultural property legislation overall. It has already been ratified by the majority of states worldwide and was a significant new step in cultural property regulation.⁶⁴ In addition to being “demonstrated in the preamble to UNESCO 1970 which sets forth cultural property as one of the basic elements of civilization and national culture and acknowledges that its true value can only be appreciated in the fullest context possible”⁶⁵, Merryman emphasizes parts of the convention like article 4 as proof of its culturally nationalistic tone:

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions,

⁵⁹ Knox, 2006, p. 323

⁶⁰ Merryman, 1985, pp. 1912-1913

⁶¹ *Id.* pp. 1914-1916

⁶² *Id.*, p. 1912

⁶³ Merryman, 1988, pp. 489-495; Sljivic, 1998, pp. 399-400

⁶⁴ UNESCO: Illicit Traffic

⁶⁵ Knox, 2006, pp. 323-324

with the consent of the competent authorities of the country of origin of such property;
 (d) cultural property which has been the subject of a freely agreed exchange;
 (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.⁶⁶

According to Merryman, articles like this set a very different tone about the allocation of cultural property than Hague 1954. In here, the emphasis is on the states – it is up to them to define their cultural property in any way as they wish, and the convention sets out to protect the national interest of retention of such property.⁶⁷ Ana Sljivic expands on how UNESCO 1970 works towards the nationalist premise:

Under Article 3, trade is "illicit" if contrary to a state's law. This means that if a source nation promulgates a law proscribing export of particular items, such export is "illicit" under the treaty. Thus, what constitutes "illicit" trade is subject to the vagaries of national rather than objective criteria. Such a "blank check," giving a source nation the power to define "illicit" subjectively, without participation from market nations, affirms the idea that UNESCO 1970 is preeminently nationalist legislation.⁶⁸

Merryman's thoughts about cultural nationalism and internationalism aren't, however, always taken at face value. Those in the discussion (including Merryman) tend to be somewhat biased towards either side, which results in the fact "that the choice of terms in which to conduct such a discussion is unfortunately often predisposed toward a particular view" and Merryman tends to use several fairly value-charged terms.⁶⁹ Prott also criticizes Merryman's claim of the international documents' support for either side, as much of the rhetoric in their articles stems from very different legislative goals: UNESCO 1970 has to be very wide in its definition of cultural property, because the list is exhaustive, and has to allow different cultures valuing very different types of cultural property, while Hague 1954 is exemplary (and created with a much narrower view of cultural property in mind).⁷⁰

Merryman is also criticized for having a very Western view of cultural property. According to Nora Niedzielski-Eichner, "[t]he claim that art transcends national boundaries makes sense in relation to art created with that goal in mind", but not all art fits that mold.⁷¹ Missing from his list of what types of things cultural property is comprised of and whose items they are, "are those groups not comfortable with having their cultural objects considered as commodities for the market; tribal and indigenous communities and

⁶⁶ UNESCO 1970, art. 4

⁶⁷ Merryman 1988, *passim*

⁶⁸ Sljivic, 1998, p. 405

⁶⁹ Prott, 2005, pp. 226-227

⁷⁰ *Id.* pp. 227-228

⁷¹ Niedzielski-Eichner, 2005, p. 194

creators of various sorts not regarded within their communities, or regarding themselves, as artists but bearers of a communal tradition.”⁷² Merryman’s idea of cultural property is that of commodities, while many critics emphasize the value of cultural items for (especially indigenous) communities, items important for the traditions of such people.⁷³ Finally, regarding the movement of cultural objects advocated by Merryman’s internationalism, “[m]any objects, particularly those created for religious or political contexts, were never intended for circulation, because their significance is tied to their place of origin.”⁷⁴

There are also other criticisms, some of which will be dealt with in later chapters. Finally, I personally feel that the term ‘nationalism’ in cultural nationalism is quite value-loaded, and perhaps does not serve the true ideals behind the principle. A term such as ‘contextualism’ or ‘localism’ might better serve the purpose.

3. Brief History of Cultural Property

This chapter explores the history of cultural property to better understand the concept and its origins, tracing its roots to the role of art in Antiquity, and the history of plunder. It is a history of slow and gradual changes in attitudes and ideals that eventually lead to the emergence of the concept as it is known today. I will trace these changes through the lens of the history of plunder, as the attitudes towards plunder reflect very closely those towards cultural property. Looting in war has also had an important role in shaping the ideals of cultural property from a target of systematic plunder to something inviolably tied to the people who have created it. This will also, at the same time, explain how and why the situation where the objects are spread around the globe has come to be, where the idea of the universal museum has come, and how there can be two such opposite ways to view the allocation of cultural property as cultural nationalism and internationalism. In some ways, they can be seen as the views of the plundered and the plunderer.

⁷² Prot, 2005, p. 228

⁷³ *Id.* p. 231

⁷⁴ Niedzielski-Eichner, 2005, p. 194

3.1. Ancient World and beyond – Near East, Greece, Rome

3.1.1. *Near-East and Greece in Antiquity*

Art has always been a central part of human nature and culture. And for almost as long, it has also served many different purposes. While it can be purely a source of beauty and aesthetics, very often there are also important other functions it represents: might, prestige, conviction, propaganda. As an important representation of such power, art has often had an important role also in warfare, and there is historical evidence from thousands of years ago of art plundered after a victorious campaign. The Near-Eastern people of Akkadia had in the 23rd century BCE constructed a victory stele to commemorate their triumph over the Lullabi people, but about a thousand years later, the same stele was plundered by Elamites, who conquered the once-Akkadian city of Sippar and took it to their own capital, Susa (and carved on the opposite side a depiction of their own victory over the Akkadians). At the same location it was then excavated in 1898 CE by the French and now stands in the Louvre Museum in Paris.⁷⁵

However, the plunder of art is not the only continuous feature represented here. Soon after the victorious Akkadian leader, Naram-Sin, died, the Akkadian empire collapsed after a severe drought and a resulting famine. This fall was associated with Naram-Sin's looting of the Temple of Enlil, which had brought the wrath of the gods upon the Akkadians. This perceived sanctity of religious sites, and the moral outrage after their looting, is a persistent theme in the history of plunder, and is especially strong throughout Antiquity.⁷⁶

The Greek historian Xenophon wrote that, in the Middle-East, the tradition had been that the plundering of the defeated enemy was the rule, the only exception to which was a humane decision by the general (philanthropy). And this tradition continued with the Greeks and Romans as well. Sometimes the items themselves were believed to have a great impact in the faiths of those involved, such as the protective Palladion statue of Troy, the loss of which was said to have caused both the city's downfall, as well as, later, of those who had stolen it due to the sacrilegious nature of the act. This, of course, resulted in a further importance placed on such items, for both the defender and the

⁷⁵ Trevor-Roper, 1970, p. 7; Miles, 2008, p. 16.

⁷⁶ Miles, 2008, pp. 16-18

attacker, and as both coveted plunder and sacred relics not to incite the wrath of gods. Of course, not all statues were considered to have supernatural qualities, but this did not mean such statues could not also have similarly important value. One such example are the Tyrannicides of Athens, who the Persian king Xerxes had removed to his capital, Susa, upon his sack of Athens. Representing the uprising that had led to the first democratic constitution in Athens, these statues had such widely-known symbolic importance for the Athenians that not only were new replacements immediately commissioned after Xerxes had been driven out of Greece, but about 150 years later Alexander the Great is said to have sent the originals back to (the recently conquered) Athens, in a gesture of respect.⁷⁷ This reveals an idea very reminiscent of cultural property.

Though plunder was an essential part of war, in Greece art wasn't often a specific target of plunder, but rather a result of the war. Art was created as a result of victorious battles and campaigns, in order to thank the gods for the success. Art and religion were inseparable, as the former was inseparably tied to the latter. Everything in the temples was considered the property of the gods, and so immune from the plunder of war (unlike all other property). Especially the Greeks, but also their enemies, respected this rule quite well – though obviously not without exception, and the respect would also diminish as time went on, due to, for example, the economics of warfare (but the moral outrage didn't diminish even though the rule became violated).⁷⁸ There was also art in the cities' public areas – especially statues were used in this way. Private consumption of art was practically inexistent, and only slowly began rising from the 5th century BCE onwards.⁷⁹

These early manifestations may explain in part the perceived sanctity of cultural property even today. For one, much of the origins of art (and as such, cultural property) are in expressions of religion; in other words, cultural property often literally was sacred. Secondly, already the Tyrannicides show that art has from the beginning come to act as symbols for their places of origin. In addition, as shown by the victory stele of the Akkadians, it has been used to symbolically elevate people over others, a show of power.

⁷⁷ *Id.*, pp. 19-20, 24-26; Greenfield, 2007, pp. 388-390

⁷⁸ It is also notable that although it was always frowned upon, in the early Greek society piracy was an acceptable way of life. In fact, piracy and warfare were quite indistinguishable from each other, as in both cases a central emphasis was on pillage and plunder. Only with the development of more organized states (around the shift from the Archaic to the Classical period, circa 500-330 BCE), and so also organized armies, does piracy begin to differ from warfare and begins to be seen as more purely a criminal and immoral activity. De Souza, 1999, pp. 17-26

⁷⁹ Miles, 2008, pp. 30-37; Kivistö & Riikonen, 2009, p. 359

3.1.2. *Ancient Rome*

Romans were mainly not themselves producers of art. There would be, however, a growing interest for art in the empire, which in part resulted in a repeated, massive importation of works of art from the conquered areas. They did still share many qualities with the Greeks regarding the plunder after warfare. It was also with the Romans, that “aggressive art imperialism became institutionalized ... beginning with the looting of cultural property by Roman forces in the sack of Veii [in 396 B.C.]”⁸⁰ Plunder was an essential part of warfare,⁸¹ and they could quite ruthlessly (and in an organized and systematic way) sack the cities they conquered, but upon entering temples and sanctuaries they would act very respectfully and even ask the statues themselves whether they’d like to come to Rome.⁸²

The Roman expansion especially into Greece brought in a flood of new resources and works of art into Rome, and sparked a heightened interest for Greek art amongst Romans. There were two opposite responses to it. On the one hand, many thought that having such magnificent works of art concentrated on display at Rome would emphasize the empire’s glory and strength, but, on the other hand, there were also many who, for example, felt that the desire of such luxuries spoiled the Roman integrity and strength. Although for the Romans, much like for the Greeks, art was still in general a public experience, the private collection of art was in greater demand than before. It is notable, however, that in Rome homes were regarded much more as public spaces than later, so even there the art would not be purely in the private sphere. One concern about the appropriation of notable art from the conquered lands was voiced by at least Polybius, as well as, to some extent, Cicero, upon seeing Greeks in Rome lamenting over statues plundered from their home town. They were afraid of the antipathy against Rome that such encounters might bring on the foreigners. Indeed, the writers here quite explicitly recognize the emotional charge and (nationalistic) value significant works of art have in their culture of origin.⁸³

The fears of those such as Cicero did not greatly affect the quantity of plunder in Rome, but an effect may be seen in that many of the most applauded and

⁸⁰ Merryman, 2006a, p. 4

⁸¹ The importance of art as bounty of war is best illustrated by the Triumph, the highest honor granted by the senate to the most successful generals. In a Triumph, the spoils of war were displayed in a ceremonial procession through Rome. (Miles, 2008, pp. 55-60)

⁸² Miles, 2008, pp. 13, 48, 50-53

⁸³ *Id.*, pp. 60-62, 82-90, 185-186; Kivistö & Riikonen, 2009, p. 359

respected generals were, in fact, such who showed mercy and restraint upon the usual pillaging of the conquered cities. Some not only spared people and treasure, but even made an effort to even return culturally important treasures cities had lost to pillagers. The most famous such general was Scipio Aemilianus, who, after the destruction of Carthage in 146 BCE, returned “revered and sacred images that had been taken by Carthaginians from Greeks in Sicily”⁸⁴, echoing the actions of Alexander the Great in his restitution of the Tyrannicides (though it is unlikely that Scipio would have had this in mind). Actions like this were also much applauded by those who feared angering people in cities whose statuary and other property the Romans took. In a different type of incident (one that is opposite, but shows the same kinds of ideals), after he had quite ruthlessly pillaged the Greek city of Ambracia in 189 BCE, general Fulvius Nobilior was ordered by the Senate to return his plunder to the city (though many statues nevertheless remained in Rome).⁸⁵

3.1.3. *Cicero and the Verrines*

In Rome, there was one event which had a great influence on views and arguments about cultural property all the way to even our times. This was the prosecution of Gaius Verres, on the charges of extortion of forty million sesterces from the locals while he was acting as the governor of Sicily, from 73 to 70 BCE (exceptionally for three years, instead of the usual one, due to the slave rebellions of Spartacus). Although the charges themselves were not formally about the misappropriation and plunder of local cultural treasures, but rather a more general charge of misuse of office, Cicero – the prosecutor – spent a great deal of effort to prove how Verres had not only extorted money but acted in ways even more heinous and un-Roman, even before his time as governor of Sicily – and here the plunder of art came into central stage. And though Cicero never got to deliver most of his speeches in the trial because already after the opening statement Verres decided to go voluntarily into exile, it did not stop them from becoming widely known and recognized after he had published them in writing.⁸⁶

The actions of Verres describe what the Romans’ lust for art could be like in extremes and what kind of a status art had in Rome, but more importantly, the widely

⁸⁴ Miles, 2008, p. 96

⁸⁵ *Id.*, pp. 95-99; Kajava, 2009 p. 129

⁸⁶ Miles, 2008, pp. 116-117, 125, 129-131. Before the *Verrines*, the publishing of speeches was not a common practice (and in fact it could be said that the *Verrines* created this literary type). On Cicero’s reasons for publishing, see *Id.* pp. 137-143

spread speeches that Cicero published would set the tone of the rhetoric – and even explicit arguments – used in cultural property repatriation argumentation for millennia to come. Even in the late 18th century would the *Verrines* be used as an important model by Edmund Burke in the prosecution of Warren Hastings, and the speeches were still widely used as models of rhetoric and as a common part of Latin education in the 19th century.⁸⁷ And in his famous poems against Lord Elgin, Lord Byron drew much inspiration from Verres as well.⁸⁸

Cicero wanted to paint a picture of Verres as a ruthless pursuer of own gain and a greedy hoarder of luxuries. In this he not only looked throughout Verres' career as an official, but compared him to examples of past activities of honorable Romans. Throughout his career, he had managed to create an astonishing track record of criminal activities of everything from theft and extortion to murder.⁸⁹ Cicero didn't condemn even large-scale plunder and pillage, but that was always only done when it was necessary as a part of war. In comparing Verres to the honorable generals, Cicero wanted to show both that the plunder was only acceptable in war against enemies, not during peace with people under Roman control, as well as that the honorable generals showed modesty, personal restraint and respect for the defeated people and their culture and property.⁹⁰ The *Verrines* in their own part solidified the idea of every peoples' right to their own cultural property, the culturally nationalistic argument.

3.2. Cultural Property and War in Modernity

3.2.1. 30 Years' War

In the example set by Rome, following empires such as Byzantium would place high emphasis on the symbolic power of public works of art, but soon looting in the scale that it had been would greatly diminish. The later era of the Middle-Ages brought back plunder in a larger scale in the Crusades, and we can still see some of their plunder in for example Venice, who took the four horses of Lysippos from Byzantium in 1204 (and, ironically,

⁸⁷ *Id.*, pp. 7-8, 302, 305-307

⁸⁸ St. Clair, 1967, pp. 163

⁸⁹ See in general Miles, 2008, pp. 105-151. In one extreme case, Cicero even talks about Verres crucifying a Roman citizen – “a punishment usually reserved for rebellious slaves.” (*Id.*, p. 133)

⁹⁰ *Id.*, pp. 97-100

centuries later lost them again to Napoleon, though only for a while).⁹¹ But, although the crusaders could certainly be as aggressive with their plunder as the Romans, in the late period of the Renaissance a new emphasis was placed on private collections, which meant a change of direction in the course of plunder, as before the emphasis had been on more public monuments.

Coming to the 17th century, collections of all kinds – especially art and books – would come to mean things such as power and personal magnificence for the ruler who held them (and it was not only the rulers – by the end of the 16th century the greatest aristocrats could outdo even the princes with their collections); the function of art had changed drastically since the times of Rome. The monarchs rivaled each other in building collections more grand than the other, a trend greatly helped by a time of relative peace (though the extravagances of the princes did cause unrest amongst the common people who would end up paying for them) and a newly-founded, continent-spanning art market in its full boom. However, the competition eventually culminated during the 30 Years' War, in “the last unredressed violent artistic upheaval in Europe.”⁹²

When hostilities broke out all throughout Europe in the 30 Years' War, it was no coincidence, then, that the art collections of the rivaling kingdoms became a prime target of pillage. There was a great symbolic power in absorbing the collection of an opponent, and this would happen, or be attempted, numerous times over the course of the 30 Years' War, beginning with the swallowing of the Protestant Palatine library into the library of the Vatican – and act quite unlike any before between European nations. But not all the art would be plundered. The court of Mantua sold in 1627 and the following years the bulk of their famous art collection to keep up with the dukes' boisterous lifestyle, an act which caused a huge outcry amongst the people of the city who had come to consider the collection a national one, instead of private property of the dukes.⁹³ The Mantuans heralded a change in attitudes to be followed on a wider scale only in the 19th century.

⁹¹ Merryman, 2006a, pp. 5-6; Miles, 2008, p. 275-281; Wilson, 1985, pp.102-103

⁹² Trevor-Roper, 1970, pp. 7-16

⁹³ *Id.*, pp. 22-36. In a sale that was viewed by contemporaries as scandalous, the collection was bought by Charles I of England who considered this purchase the most successful moment of his career. He would not part with the collection even though the Mantuans were willing pay twice the sum to buy it back. As it were, the works of art were safer off in England, as soon after the sale the 30 Years' War caught up with the city and the palace was stripped of all remaining works, never to be found again. After the demise of Charles I in the English Revolution, the collection would be sold on to agents of other sovereigns.

The battle over the arts in the 30 Years' War eventually culminated on the collection of Rudolf II (1552-1612), Holy Roman Emperor from 1576 to 1612. Though there were many other collections alike, the very reclusive and eccentric emperor had managed to assemble the most magnificent collection in all of Europe, by patronizing and buying works from many of the greatest artists and craftsmen from around the continent. It was no surprise, then, that after his death, in the 30 Years' War, his treasures did not survive for very long in one place. The first threat came already in 1619, but from within: "the rebellious Bohemian nobility, having deposed of the Hapsburgs (at least on paper), proposed to convert their treasure into cash in order to finance their revolution"⁹⁴, but the sale was interrupted by the battle of the White Mountain. A much greater threat ensued when the Swedes entered the war in 1630. The Swedes, led by Gustavus Adolphus, vigorously plundered the cities they conquered, such as Munich in 1632 – at which point its collection was second only to the Emperor's. The King died soon after, though, only to be followed by his daughter, the culturally insatiable Queen Christina, who was intent to turn the capital city Stockholm into one of the cultural centers of Europe. And for this she turned her eye on Prague, and the collection of Rudolf II. On the first occupation they missed the loot because the imperial chamberlain had hid it in time in a safe place. But the second time, in a hurry before the peace-negotiations already underway would spoil the opportunity, Prague was captured again and plundered with the clear object of securing the imperial collections for the Queen.⁹⁵

The Queen did not, however, long hold on to her vision of Stockholm as a cultural center. In 1654 she abdicated the crown and left for Rome, taking much of her art collection with her, buying, selling and even looting (from unsuspecting hosts) more works on the way. After her death, the collection dispersed even further. The plunder of Rudolf II's collection is the last successful campaign of plunder of arts in such a scale, and not to be equaled perhaps until the Second World War, or at least the Napoleonic wars. Although later it would be attempted by at least Napoleon and Hitler, in the long run all those attempts would be redressed. The Peace of Westphalia also stabilized conditions so that the warring princes in Europe would no longer pillage each others' treasures like they had in the 30 Years' War and before. Art also lost some of its ideological meaning and wasn't such an integral part of the prestige of the government – and in fact, as had in some ways

⁹⁴ *Id.*, p. 17

⁹⁵ *Id.*, pp. 12-13, 17-18, 38-45. Much of the art did not make it to Stockholm, but was lost on the way (which wasn't unusual).

already been seen in Mantua, it would become more and more seen as something of the public sphere, national collections, instead of private property of the ruler.⁹⁶

3.2.2. *Napoleon*

But the idea of the one center of culture with all the greatest works of art in the world was not dead for good. At the end of the 18th century, Napoleon had the vision of Paris and the Louvre as such a place, and had very systematic plans for achieving this goal.⁹⁷ In his conquest of Italy, he had already before the invasion devised a precise plan on where, how and what pieces of art would be looted and brought back to Paris from the conquered cities. And his success in war made sure that his plans would bear fruit. In a couple of years Napoleon had stripped most of Italy of all its greatest sculptures and paintings and sent them to Paris to the Louvre (soon to be named Musée Napoléon). He took a lot from the Vatican, moving the entire papal archive from Rome. As a further connection between his empire and that of ancient Rome, when the most important works would arrive in Paris, Napoleon had them displayed in a procession closely modeled after the Triumphs in Rome.⁹⁸

The actions did not go uncriticized, though – certainly not abroad, but even inside France, there were some who would openly oppose such a violent dislocation of art, the most recognized of which was artist and architectural theorist Antoine-Chrysostôme Quatremère de Quincy. In the open letters to General Miranda, he made good use of Cicero's *Verrines*, and contrasted Napoleon's actions to those of Scipio Aemilianus, famed for his repatriation of statuary. Although his objections were in part political,⁹⁹ Quatremère made his case by claiming that art was universal and so not to be possessed, but rather ought to be held in its original context, for the benefit of all humankind (an idea originating at least from Polybius, and transmitted to Quatremère through Cicero).¹⁰⁰ Quatremère is one of the first to argue in these very modern ideas of cultural property of all humankind and original context. What is most striking to the contemporary observer is,

⁹⁶ *Id.*, pp. 47-59; Wilson, 1985, p. 103

⁹⁷ On the origins of the Louvre, see McClellan, 1994

⁹⁸ Miles, 2008, pp. 319-324; Gould, 2007, pp. 4-6

⁹⁹ McClellan, 1994, p. 195

¹⁰⁰ Miles, 2008, pp. 326-327

however, that he in fact combines the internationalist and nationalist arguments into one.¹⁰¹ In fact, originally the two ideals were usually not so separate, as they now appear.¹⁰²

Of course, Napoleon's looting was not limited to Italy. His armies would plunder treasures from wherever they went, for example Germany and the Netherlands. But the French quest for loot was not only restricted inside Europe, as they amassed a great mission in North Africa, mainly Egypt, as well. While the military side of the campaign was quite a fiasco, the artistic side had remarkable results. With the troops Napoleon had scientists and specialists, doing research, excavations and the like. The result was "a wealth of knowledge about Egypt, ancient and modern"¹⁰³ as well as a handsome collection of excavated artifacts, some brought back to Paris and some – such as the Rosetta Stone – lost to the British after the military defeat the French suffered in Egypt. The result of the Egyptian campaign was something far-reaching and unforeseen as it inspired a new wave of enthusiasm towards Egyptology – and on the contrary to the Italian plunder, the Egyptian artifacts were well-received throughout Europe.¹⁰⁴

Napoleon's plunders came to an end at the battle of Waterloo in 1815, when the Allied forces finally defeated the French. The Commander of the British army, the Duke of Wellington, made the historic decision to return all the art plundered by the French to their earlier owners. He also left all works that did belong to the French where they were, even though there were those who saw it fit to plunder as reparations for the losses suffered in war (an argument used by the French before). In fact, the British took nothing from Paris – though the locals, who saw the art as rightfully belonging to them now (due to many reasons, amongst them the custom of "to the victor the spoils", as well as due to the plunder having been made through quasi-legalistic peace treaties), directed their resentment towards them. Nevertheless, although many pieces could not be returned for a variety of reasons, a majority of the artwork plundered by the French was now

¹⁰¹ McClellan, 1994, pp. 194-197. Quartremère and his allies' campaign did eventually bear some fruit with the Bourbon Restoration of a great deal of religious material, but his campaign against museums like the Louvre in general wound up unsuccessful. (*Id.*, pp. 194-204). As has been noted earlier, for Merryman, Quartremère represents one of the early examples of cultural internationalism, but as can be seen, in reality his ideas were a blend of both internationalist and nationalist ideas and can be used by either side of the argument for completely opposite positions. See Prott, 2005, pp. 228-229

¹⁰² Gillman, 2010, p. 55

¹⁰³ *Id.*, 2008, p. 328

¹⁰⁴ *Id.*, 327-329; Greenfield, 2007, pp. 238, 390. The result was also that the campaign sparked somewhat of an obsession in all the European powers, and especially caused a massive competition between England and France, where both sides would furiously excavate the desert for hundreds of thousands of artifacts. Shuart, 2004, pp. 667-669

returned in a fairly orderly fashion to their previous owners (including, to Venice, the aforementioned horses of Lysippos (nowadays more often known as horses of Saint Mark)). The restitution after Waterloo set a huge precedent for future warfare, and had a great impact in changing the views regarding plunder towards opposing it.¹⁰⁵

In part, Napoleon's actions were fueled by the great competition of the colonial powers. All the countries in Europe wanted to show off their might though many different ways and cultural property was an important way of doing that. It was not only Napoleon that wanted the great universal museum. In the course of the 19th century, the colonial powers would import huge amounts of cultural items from all over the world. Combined with a great thrive in pursuit for scientific knowledge, there was a massive influx of artifacts and works of art coming in to the Western countries. Some were from legitimate archaeological sites, some from more-or-less ruthless demonstrations of colonial power.¹⁰⁶ It is also in this time that some of the most famous restitution cases were conceived, for example the Parthenon Sculptures and the Benin Bronzes.

3.2.3. *World War II*

The last great campaign of plunder of arts was performed by Nazi Germany before and during the Second World War. By this time, though, there was a clear rule of international law, developed through custom and finally written down in article 46 of the Hague Convention on the Laws of War in 1907, as well as the Kellogg-Briand pact of 1928, both of which Germany was a party. Hitler had a very similar idea as Napoleon and Queen Cristina of Sweden (an idea that can be traced all the way to Rome) – to create a cultural center of Europe (and the world). Hitler wanted to amass all the greatest art in Europe into Linz, into what would be the “Führermuseum”. Much of the art also went to the highest ranking Nazi officials, and especially much of the “degenerate”, un-Aryan art – mainly modern art and art that had something to do with the Jews – would also be sold on.¹⁰⁷

The way the Nazis performed their looting was extremely systematic, especially when plundering from the Jews. There were several organizations charged with the task – though many of them were also overlapping and would result in a competition and conflict between the different branches. In France there were three:

¹⁰⁵ Miles, 2008, pp. 329-336; Mackay Quynn, 2007, pp. 6-9; Merryman, 2006a, p. 6

¹⁰⁶ Barkan, 2002, pp. 19-20

¹⁰⁷ Merryman, 2006a, pp. 7-8; Walton, 1999, pp. 556-557; Feliciano, 1997, pp. 15-16, 20-21

The Kunstschutz, which took its orders from the Wehrmacht; the German embassy in Paris, which took its orders from the Ministry of Foreign affairs; and the Einsatzstab Reichsleiter Rosenberg für die Besetzten Gebiete, known as the ERR, which took orders directly from Nazi ideologue and Party leader Alfred Rosenberg. In the end, it was the ERR that dominated the other two branches, though to complicate matters still further, Reichsmarschall Hermann Goering ... surreptitiously but effectively controlled the ERR.¹⁰⁸

Joseph Goebbels was placed in charge of a mission to repatriate German art from the conquered lands. There were three types of art to be repatriated: art taken in the Napoleonic Wars; art of German origin; and art of “Germanic character”. In aiding this, the heads of the party sent an order to art historian Otto Kümmel, “to compile an exhaustive list of German art held in foreign countries since the beginning of the sixteenth century.”¹⁰⁹ Aided by this three-volume list consisting of even the smallest pieces of art, and which did not care about how the art had been transferred away from Germany, the Germans demanded art returns from all over Europe and beyond, including the United States and the Soviet Union. And of course in all the conquered countries any objects on the list could simply be taken, though the Nazis did also at times appear to follow quasi-legal formalities. And it wasn’t always utterly baseless, as in the case of France there was still a great deal of art that had been just as wrongfully plundered by Napoleon.¹¹⁰

But the worst of the Nazis was to be received by the Jews wherever the Nazis had control, and they would be stripped of all the valuable possessions they had (wherever the Nazis invaded, it was always first the Jews who were the target of plunder, then any other property deemed to be seized to Germany).¹¹¹ The Germans were also very aware that many of the leading art dealers in Europe were Jews, and so there was a double incentive for them to track down every Jewish collector and their often-impressive collections (which the owners, of course, did often do their best to hide – as well as transfer abroad). Especially in France, there were, for a country at war, almost incredible resources spent on the tracking down and transferring away of the art collections of the Jews.¹¹²

According to an estimate made by the Allies in 1949, over the course of the Second World War the Nazis stole just under 250,000 paintings alone. And if one counts all the different types of cultural property, the amount of stolen object is well in the

¹⁰⁸ Feliciano, 1997, pp. 4-5

¹⁰⁹ *Id.*, p. 24

¹¹⁰ *Id.*, pp. 3-6, 24-30; Walton, 1999, p. 557

¹¹¹ Merryman, Elsen & Urice, 2007c, p. 16

¹¹² Feliciano, 1997, pp. 16, 23, 39-40, 46-49

millions.¹¹³ However, it was not only the Nazis who would plunder in the war, as also the Soviet Union would make its own campaign of systematic looting of the conquered German territories (partially motivated by retribution,¹¹⁴ partially by other reasons, like their own desire to create a museum like the one Hitler had planned in Linz¹¹⁵). In a short while, after conquering the formerly German-occupied territories, the Soviet Union had extracted hundreds of thousands of pieces of cultural property from Germany, whether it was Russian or German of origin or having been taken by the Nazis from any other of the Allied countries.¹¹⁶ However, even with the massive counter-plundering campaign performed by the Soviet Union, the amount of art looted by them would still not compare to the amount plundered by the Nazis.

There were already during the war plans being made within the Allies of restitution of art looted by the Germans. Once Germany had been defeated, however, almost all attempts at coming to a functioning solution between the winning states failed. All the countries had their own interests they were trying to push forward, and all the while the Soviet Union was hiding all information from its territory as well as continuing (also in secret) its own looting campaign.¹¹⁷ There were several important collections that were thought lost or destroyed during the war that were only in the 1990's discovered to have been taken and hidden by the Soviets.¹¹⁸ The restitution campaign was erratic at best, certainly not helped by the upheaval of almost all of Europe and its cultural property as a result of the war,¹¹⁹ and hindered even further by the Soviet Union's actions, but it did plant an important seed that did perhaps in later decades grow into a more effective campaign towards a more comprehensive restitution. Of course, at that point a lot of the artwork, information and rightful owners had gone missing.

Regarding cultural property, the Allies did, however, manage at least one notable result at the end of the war: in the Nuremberg trials, for the first time in history the

¹¹³ Walton, 1999, p. 550

¹¹⁴ Feliciano, 1997, p. 218

¹¹⁵ Kurtz, 2010, p. 187

¹¹⁶ *Id.*, p. 182; Merryman, Elsen & Urice, 2007a, pp. 63-64. On the Soviets' removals of cultural property, Stalin's decrees and how the plunder was organized, see Akinsha, 2010. On Russia's laws that make any restitution of World War II plunder very unlikely, see Grimsted, 2010 and Sandholtz, 2010.

¹¹⁷ Kurtz, 2010, *passim*

¹¹⁸ Merryman, Elsen & Urice, 2007a, pp. 63-64

¹¹⁹ Chamberlin, 1983, p. 177

plundering of cultural property was made into a war crime when many of the Nazi officials were charged and sentenced with charges relating to (among other things) the looting.¹²⁰

The results of the plunder of art during the Second World War are still visible today. The massive upheaval of art caused numerous priceless collections to be scattered around the world, into both public and private hands. Many who bought or got a hold of such pieces did know their history (or knowing the risk did not wish to inquire too deeply into the provenance)¹²¹, but many also didn't, and the more hands such a piece has been passed to, the more unlikely it is that there is any knowledge of the original illegality of the acquisition. This has caused lots of strife between owners in good faith and original owners (or their heirs) hoping for restitution. And because of the nature of the art market, it is easy for potential buyers and sellers to hide details of the exchange, the parties and the provenance of a piece from the larger public, so that in a case where a painting which could be claimed by the original owner, those involved can either pull the piece from an auction, or hide it so that it cannot be traced.¹²² It has also been said that at least most museums hold stolen art in their collections.¹²³ And there are still, on a fairly regular basis, cases of art stolen by the Nazis found and even confiscated from private owners. Most recently, in the beginning of November 2013, news spread of a German man whose father had been an art collector in the 1930's and 1940's, with a collection of art many of which were most likely taken from the Jewish by the Nazi, with an estimated value of up to even a billion dollars.¹²⁴

The experiences of World War II also greatly affected the birth of international (as well as national) legislation on cultural property. The fact that "[c]ultural property instruments arose out of experiences of conflict"¹²⁵ and that "[t]he struggle to define 'cultural property' and to determine appropriate protection for it in the twentieth century has arisen from, and is entwined with, looting and theft of (primarily art) objects during war"¹²⁶ have strongly affected what kind of route the (international) legislation has

¹²⁰ Merryman, Elsen & Urice, 2007c, pp. 16-21; Feliciano, 1997, p. 6

¹²¹ Jones, 2012, p. 3: "Many of the [Boston Museum of Fine Arts'] works of art from the Nazi-era have little or no provenance record. In a conversation with Dr. Victoria Reed, she indicated there was time after World War II when curators and directors frequently did not want to inquire too deeply into how a work of art came into possession by a seller or donor. She made it clear, though, that just because there is a gap in provenance does not necessarily mean that the art was improperly acquired from victims of Nazi persecution."

¹²² Walton, 1999, pp. 567-568; Meyer, 1974, pp. xiii-xiv

¹²³ Walton, 1999, p. 572;

¹²⁴ BBC News: Nazi looted art

¹²⁵ Flessas, 2003, p. 1082, footnote 49

¹²⁶ *Id.*, p. 1092

taken. There has always been a strong emphasis on the preservation of the objects, as shown by the very first treaty on the matter, the 1954 Hague convention. The UNESCO 1970 convention also emphasizes this point, as well as the role of the nations and their right to their own cultural property (in other words, emphasizing their sovereignty, echoing the violations of sovereignty in the two World Wars). The international legislation in the 20th century in many ways finalized the development that properly began after the battle of Waterloo. We are also now seeing the risk of going too far, the fear of losing something we do not perhaps now see as valuable is leading a very high chance of over-flooding the cultural property field so that too much is protected and we lose sight of what really is valuable and what is not. Everything cannot be preserved and some things need to be let go if we wish to preserve cultural property as something meaningful in our lives.

4. What's Yours is Mine – Cultural Property Argumentation

In this chapter I explore the argumentation in the demands for the restitution of cultural property. The aim is, on the one hand, to act as an introduction into the debate: to present its foundations and such arguments that are used throughout the discourse. On the other hand, the aim is to find out *how* different arguments are used throughout the discussion, in order to find out if there are structures and patterns in the use of the argumentation and the rhetoric which can then be used to explain some of the indefinite nature of the debate.

There are certain themes and types of argument that tend to repeat themselves in different cultural property restitution cases. For example Paul Bator¹²⁷ (though speaking in more general terms) and Lyndel V. Prott and P.J. O'Keefe¹²⁸ have gathered and compiled a great deal of the different arguments used in the debate. In Bator's approach, there are different values which, in effect, can be translated into actual arguments, and from his values other writers have developed this categorization even further.¹²⁹ Prott and O'Keefe have compiled six main arguments for restitution and five for retention. In addition, they list several background factors which also have an effect in the

¹²⁷ Bator, 1982

¹²⁸ Prott & O'Keefe, 1989

¹²⁹ Urice, 2006, p. 145. In regards to the work by Bator, Patty Gerstenblith has critiqued his approach, saying that while Bator does acknowledge "the losses caused by plunder of sites and monuments, his failure to treat differently the category of archaeological materials looted directly from the ground and to incorporate that distinction consistently into his legal analysis produces an unfortunate but significant flaw in this landmark work." (Gerstenblith, 2001, p. 198, footnote 2) In regards to the cases studied here, however, this omission does not have great significance.

argumentation.¹³⁰ I will use these lists as basis for the comparison of the argumentation in the different restitution cases, though will omit some less important points, or such less suitable to those in this study.

4.1. Home culture

Almost all of these arguments are present in the most famous and one of the oldest of the still debated cultural property restitution cases, the Parthenon Sculptures.¹³¹ Often referred to as the *cause célèbre* of restitution cases, it has been a matter of contestation ever since its beginnings in the turn of the 19th century. The marble sculptures were removed from the Parthenon in Athens and shipped off to Britain, where they were eventually sold to the government and located in the British Museum where they still are.¹³²

The foundation of the Parthenon case, as well as all other cultural property restitution cases, is the basic notion of the cultural nationalism approach, as here defined by John Henry Merryman:

[T]he Marbles belong in Greece because they are Greek. They were created in Greece by Greek artists for the civic and religious purposes of the Athens of that time. ... [B]eing in this sense Greek, they belong among Greeks, in the place (the Acropolis of Athens) for which they were made.¹³³

As noted above, this argument is in the core of all cases for cultural property restitution – and in that sense is not even an argument *per se*, but rather a basic assessment, based on which the further arguments are made. For example, Prott and O’Keefe do not list it as a separate argument but rather under this idea are smaller arguments which in total constitute this assessment.

While in most of the cases there is no uncertainty regarding this argument – the Parthenon Sculptures are Greek and, were they to be returned, they would go to Greece (and Athens, in particular); the Nefertiti Bust would go to Egypt, and so forth – there are some where claims have been made, but it is uncertain what really would be the “rightful”

¹³⁰ Prott & O’Keefe, 1989, pp. 838-855

¹³¹ The sculptures are usually referred to as either the Elgin Marbles or the Parthenon Marbles. However, both these terms are sometimes associated with either side of the argument (“Elgin” for the English side and “Parthenon” for the Greek). Sometimes the term Elgin Marbles is also used to mean specifically those sculptures that were taken by Elgin and are now in the British Museum. I use the term Parthenon Sculptures in accordance with the agreement on that term, reached by the two governments in 2010 (Shyllon, 2011, p. 430). On the naming of the “Elgin Marbles”, see Webb, 2002, pp. 51-54.

¹³² See in general St Clair, 1967

¹³³ Merryman, 1985, p. 1911

place of restitution, should a restitution be decided upon. One such interesting case is that of Hebrew Manuscripts, which is an unusual one in many ways. Instead of being about a single object or objects from a single time and place, or even from a single source, it is a more general case for return of objects taken in many different points in history, in many different places – religious and other manuscripts taken from the Jews during the long history of oppression against the Jewish populations in Europe. Although texts of Jewish origin can be found in many places, and such texts have ended in those places in many ways, a great deal of the demands do focus on the collection of the Vatican where a large deal of the collections have wound up sooner or later, often with an unknown provenance (many of which have been taken by force at some point in history). The reasons why the manuscripts are demanded to be returned are in essence twofold: the religious and cultural importance of the texts to the Jewish people, and the morally wrongful way in which many of these manuscripts were taken (an argument which will be discussed later).¹³⁴

To leave all other elements aside and simply focus on where the Hebrew Manuscripts would belong were such a restitution to be made, there is a clear problem with this case. Unlike in the average restitution case, the Hebrew manuscripts do not have an obvious “home” where they would belong. The Jewish people, although in many ways culturally their separate group (in other words, it could be argued, not just sharing a religion but being of a kind of Jewish “nationality”), have been dispersed here and there amongst the different populations of Europe and the objects in question have been taken in many times and in many places, from indeterminable people. The main source of demands for restitution is the state of Israel which does claim to speak for all the Jewish people, but it’s somewhat questionable whether the state can really claim to represent all the Jewish people who still are scattered around the world in many different cultures – and have been a very long time in history.¹³⁵

And yet another matter are more recent cases. During the Second World War the Nazis plundered from the Jewish people and countries with large Jewish populations all over Europe. The Israeli ambassador in Prague has claimed the return of items taken by Nazis from Jews in Czechoslovakia and other European states and brought to the “Museum of a lost race”, and later after the wars passed to the Czech state. In 2004 the Czech Republic returned to Poland the Saraval collection of Hebrew manuscripts that had been

¹³⁴ Greenfield, 2007, pp. 206-221

¹³⁵ *Id.*, p. 213

stolen by the Nazis from Wroclaw in Poland in 1938.¹³⁶ These different situations reflect a fundamental question in the debate and its inherent conflicts: who has the right to represent a culture? In a less crucial manner, it also deals with the way cultural nationalism is defined: is it a matter of culture or a matter of (nationalist) state? On the one hand, in the case of the Hebrew manuscripts that have been taken in the course of history, the objects have been taken from separate communities – that do share a culture but are still also scattered around (but often kept separate from¹³⁷) the different cultures around the continent – but are now claimed by a single state created centuries later in very different circumstances. On the other hand, the post-World War restitutions have often targeted the locations where the specific communities were, like Poland. But if Israel is accepted to represent the Jewish people (and since it can even be seen as redress for the treatment of Jewish people in the Second World War), being even called “the Jewish State” in the original General Assembly resolution,¹³⁸ should the cultural objects be given there, as the state itself demands?

Many of those who survived the war did also leave for Israel, and nowadays the state is home to approximately half the Jewish people in the world. However, the general rule is that “the country of origin of a certain item of cultural property is also the country of the people whose cultural heritage that item represents.”¹³⁹ But the Jews might just be a special case, both a part of and apart from the many different (European) nations on whose territory they have been located in. The state of Israel may be the Jewish state, but some of the communities that have been the victim of the many persecutions against the Jewish people do also still exist and are making demands. There is also not just one single Jewish culture in Israel, but rather the state is rather clearly cut into different Jewish ethnicities, in quite separated societal and cultural niches.¹⁴⁰ And, as we have seen, some countries now do indeed cherish their Jewish heritage, as well. However, one Israeli writer finds this newfound respect for the cultural heritage of the long-spurned Jewish people as “ironic”, and rather states that “[j]ustice, fairness and common sense alike” dictate that “once the principle of the right of the Jewish people to own the cultural property representing their cultural heritage is accepted, the disposition of this property and the modalities concerning its distribution will become a matter to be settled between the State

¹³⁶ *Id.*, pp.220-221

¹³⁷ Blum, 2000, p. 92

¹³⁸ GA 181 (II), p. 133

¹³⁹ Blum, 2000, p. 92

¹⁴⁰ Dominguez, 2000, pp. 30-35

of Israel, on the one hand, and the organizations representing the [major Jewish communities of the Diaspora], on the other hand.”¹⁴¹ But this is a matter far from resolved, and one that is of the essence in all cultural property debate.

A comparable case is that of the Zeus Altar of Pergamon in Berlin.¹⁴² It was created in the 2nd century BCE in what was then a Hellenistic culture, in an area is now a part of Turkey, then part of the Ottoman Empire. It is Turkey that has led a campaign for restitution (though started by the local mayor, who feels that the altar is most of all a representation of the city, not Turkey), but there are clearly also connections with Greece, who are more generally seen as the descendants of the Hellenic cultures.¹⁴³

In a case related to both Israel and Turkey, several writers have also brought forth issues in the situation in relation to the division, disappearance and founding of nations, as well as cultural minorities inside such nation states:

It is also true that the question of return can be very complicated because of the creation of new nation states. For example, the question might arise whether Iran could validly claim Kurdish material. There are many situations in which minority, ethnic or religious groups are seeking autonomy within a state and where an object could be a focal point of this ambition, such as, for instance, the Sikh throne of Amritsar.¹⁴⁴

A similar problem would rise for nomadic tribes or such tribes in Africa that have been split between different states artificially in the division of the continent by the colonial powers. All in all, the problems here show that the idea of a home culture is far from clear, and in many cases it will require the settling of many deeper issues before any considerations for the actual restitution can even be made.

4.1.1. Home culture subcategories

As stated above, the “home culture” argument or assessment can be seen to have several subcategories which, in my opinion, act as the actual arguments in the debate. In the categories set by Prott and O’Keefe, these are the need for cultural identity, the appreciation in its own environment and the need for national identity.¹⁴⁵ In the value-

¹⁴¹ *Id.*, pp. 90-94

¹⁴² The altar was brought in the late 19th century from the Hellenistic city of Pergamon, in the area of modern-day Turkey, to the Prussian Empire, and is now reconstructed (though not necessarily authentically) in Pergamon Museum in Berlin. (Bilsel, 2000, pp. 1-4)

¹⁴³ Bilsel, 2000, pp. 4-15

¹⁴⁴ Greenfield, 2007, p. 410

¹⁴⁵ Prott & O’Keefe, 1989, pp. 839-843

based approach based on the work by Bator there are two values to be seen to fit inside the main argument, the ‘inalienable national identity value’ and the ‘essential propinquity’.¹⁴⁶

Many of these arguments deal with the significance of cultural objects to the cultural identity of a people. The arguments of the need for cultural identity and national identity, the inalienable national identity value and the essential propinquity are all similar ideas, though all with some important differences in detail. The main difference between the cultural and national identity arguments is the manner in which they are utilized. The national identity argument is more a political argument than the cultural one, focusing on the building of a unified state. It is especially useful in post-colonial situations:

For the national administrations, building a national identity is an important part of their administrative task if the country is to survive as a unit, which is very often an economic imperative. Promoting understanding between regional cultures and fostering national pride in the variety of the State’s cultural achievement is one way of forwarding the necessary political commitment to a state whose historical roots are fragile.¹⁴⁷

The national identity argument also raises questions about state succession, and highlights the importance of cultural property to the unity of states: for example the throne of Menelik II was removed from Ethiopia by Italy precisely for the reason of destroying the national identity (it has since been returned).¹⁴⁸

The cultural identity argument is more about a specific community, and more about morals than the more secular national argument. A culture, in order to survive and progress, needs access to its past, and cultural property provides one such access. When a culture is deprived of objects from its past, it can create “a cultural void which cannot be filled.”¹⁴⁹ Cultures need their roots for not only a feeling of unity and community, but also for inspiration for people like craftsmen and artists.¹⁵⁰ There is a quality in cultural property that cannot quite be explained simply through the ordinary (or Western) ways of viewing the world. One way of describing this quality is through the term “mana”. This is an old concept: “[i]n earlier times conquerors took the cultural property of the losers, in the

¹⁴⁶ Urice, 2006, pp. 152-154

¹⁴⁷ Prott & O’Keefe, 1989, p. 842

¹⁴⁸ *Id.*, pp. 842-843

¹⁴⁹ *Id.*, p. 840

¹⁵⁰ *Id.*, p. 840

belief that the *mana*, or cultural identity and strength of the conquered, was embodied in those objects.”¹⁵¹

Often colonial states have had their cultural traditions denigrated and an attempt made to assimilate all in the country into the one official mainstream culture. Many cultural objects have been neglected, destroyed or taken away to Western museums. There are many cultures, both national and smaller in scale, that have found that they “are now almost entirely devoid of their cultural heritage.”¹⁵² The Oceania region has many such examples, but they can be found in many other places, as well, although the argument of being deprived of cultural property is also used by culturally rich nations such as Greece and Italy (which have seen massive amounts of cultural property exportation in their history, but also have much more to spare from).¹⁵³ With the (fairly recent) acknowledgement of the importance of cultural diversity, the cultural impoverishment of especially many aboriginal cultures is now seen as a serious issue, and several countries such as Australia have very positive attitudes in regards to restitution to such peoples.¹⁵⁴

These arguments do not go uncriticized, though. Firstly, since culture is not, in fact, tied to cultural property, it can be questioned whether there is a need for the material for a culture to continue. After all, you cannot take away the immaterial expressions of a culture.¹⁵⁵ However, without any physical expression of culture, it is too easy to assimilate and identify to the mainstream culture which is then much more visibly present and forget about one’s culture of origin. And as has been seen, there is some kind of inherent “mana” in cultural objects, which does contribute to the overall manifestation of culture.

Secondly, and related to the previous counterargument, it can be questioned how much cultural property cultures (nations) really need. A blanket request for any cultural objects of the home culture (quite rare in reality, though not unheard of) is quite excessive when arguing for not having enough cultural property to maintain the culture in question. Surely not everything is required. The argument is in a more common form when talking about countries that are already rich in cultural property – Greece and Italy are

¹⁵¹ Merryman, 1985, p. 1914

¹⁵² Gerstenblith, 2001, p. 206. According to her, this is “because of 19th century colonialism and the 20th century [art] market”.

¹⁵³ Prott & O’Keefe, 1989, pp. 839-843

¹⁵⁴ Greenfield, 2007, p. 423

¹⁵⁵ Prott & O’Keefe, 1989, p. 841

common examples. Even though they have had a vast amount of objects removed, these states still have so many cultural objects that a large majority of them cannot even be displayed but are locked in warehouses.¹⁵⁶ This is indeed a valid point, especially when speaking about ordinary archaeological objects and other “everyday” cultural property. However, in many cases there is also another value to be considered, the inalienable national identity value.

In many ways, the inalienable national identity value is simply a different formulation of the national (or cultural) identity argument. But there are certain differences. While sometimes in extreme cases some are “advocating the return of all cultural property to its place of origin, no matter what the particular circumstances,”¹⁵⁷ in more balanced claims there are certain differences in nuance in comparison to the cultural identity argument:

Balanced approaches to the very real connection between cultural property and national identity recognize that certain objects have a “symbolic nature” and “high emotion attached” to them. These symbolic and emotional connections can lead to a justification for return.¹⁵⁸

In other words, although a state or culture may have plentiful cultural property in general, there may be certain objects that have simply such an important value on their own, that it could be seen as a moral obligation to return them to their culture of origin. Of course, this requirement can also be used on the other side of the debate, and often is, to argue that a certain object does not have such value, and so need not be returned.¹⁵⁹

Sometimes, especially in the case of Egyptian artifacts, it is also argued that the objects have such an importance precisely because they were removed. The removal of antiquities from Egypt and their ensued displaying in the museums brought a boom of Egyptology in Western countries – but also in Egypt where earlier the ancient history had been widely ignored.¹⁶⁰ The newly spread interest in Egyptology also brought a whole new value to these artifacts.¹⁶¹ Also, iconic individual works like the Parthenon Sculptures and

¹⁵⁶ Merryman, 2006b, p. 110; King, 2006, pp. 304-305

¹⁵⁷ Urice, 2006, p. 152

¹⁵⁸ *Id.*, pp. 152-153

¹⁵⁹ *Id.*, pp. 152-153

¹⁶⁰ Cuno, 2008, p. 10

¹⁶¹ Miles, 2008, pp. 328-329

the Nefertiti Bust are so iconic because they've become known and adored in their Western museums.¹⁶²

A third critique in the home culture debate deals with the continuity of cultures. Many writers who are skeptic about restitution question whether many of the items to be returned can actually be considered a creation of the culture demanding the restitution. After all, many of the cultural objects are hundreds, even thousands of years old and created in very different circumstances.¹⁶³ In the most extreme examples, some writers have come to insinuate that, for example, the Greeks today have too much mixed races to actually be "true Greeks".¹⁶⁴ But on somewhat more reasonable arguments, some have questioned the fact that on, for example, religious grounds, the modern Greeks and Egyptians have simply too little in common with their ancient counterparts.¹⁶⁵ But in a sense, if one can only see the same culture as something that has not in any major ways changed over time, then one is hard-pressed to find any culture to be continued from the past.¹⁶⁶ All cultures are always in a state of flux, and if a culture needs to be static in order to be accepted the same culture in the future, then one must in many ways discard the idea of cultural continuity altogether. In such a way of thinking, culture is something only in the present (and void of any past or future), and cannot carry on to any future generations. But that is a difficult view to take, and for example in anthropology cultures are nowadays seen "as open-ended, contingent, and emergent – processes in history rather than transhistorical products having more or less coherent identities."¹⁶⁷ Of course, this does not necessarily mean that, for example, the modern Greeks are the same as the ancient Greeks, but it is difficult to deny that there is at least some connection.¹⁶⁸

In relation to the continuity of cultures, there is the value presented by John Henry Merryman, called by him 'essential propinquity'. This is generally an argument for retention, though in the right circumstances makes a strong case for restitution.¹⁶⁹

¹⁶² King, 2006, p. 299, 305

¹⁶³ *Id.*, pp. 308-309; Urice, 2006, p. 153

¹⁶⁴ Reppas, 1999, p. 930

¹⁶⁵ For example on the Egyptians, see Urice, 2006, p. 153. Regarding the Greeks, this has, however, been countered by, for example comparisons between language and artistic and scientific traditions, as well as the perceived connection to the same "Greekness". See for example Hitchens, 2008a, pp. 101-104. See also Appiah, 2009, p. 74

¹⁶⁶ Hart, 1997, p. 157

¹⁶⁷ Handler, 1997, p. 3

¹⁶⁸ On arguments supporting the continuity of ancient and modern Greeks, see Greenfield, 2007, pp. 66-67 (also on lack of true inheritance of culture); Reppas 1999, pp. 930-931; Hitchens, 2008a, pp. 101-104

¹⁶⁹ Urice, 2006, p. 153

According to Merryman, there are certain cases where the cultural property in question has such an important meaning to a specific culture, that there is an imperative to return it despite any competing reasons for retention. There are two criteria for determining such propinquity: that “the culture that gave the object its cultural significance must be alive” and that “the object must be actively employed for the religious or ceremonial or communal purposes for which it was made.”¹⁷⁰ However, if these criteria are not met, such a necessity for restitution is not there, and it is very hard to claim the return of such objects. Merryman’s argument (from his internationalist perspective) is that usually there is no additional value to be gained from the cultural property being returned to its place of origin, and so such an action is without basis.

The relics of earlier cultures in Egypt, Greece, China, and Mexico have no contemporary religious, ceremonial, or communal function. People who live in those nations today may place a high value on relics for other reasons, but the use for which they were created is not among them. The specific cultural value of the relics - for example, as testimony of the way of life of a vanished people, as great works of the art of a specific time and place - is independent of propinquity.¹⁷¹

4.2. Context

One argument for the restitution of cultural property, still somewhat related to the home culture argument, is that the objects are better appreciated in their original context. This argument is best applied to large pieces of art that have preferably been meant for the outdoors, such as the Parthenon Sculptures. The opposing side usually refers to the comparative context brought by such universal museums as the British Museum. Speaking about the Parthenon Sculptures, Dorothy King sums up the different sides:

Some xenophobic Britons claim that the Elgin Marbles can *only* be appreciated in Britain which is perhaps as extreme as the claim that they can *only* be appreciated in Greece. The British Museum’s Trustees and Director argue with more sophistication that the Elgin Marbles are better seen in the context of other civilizations and cultures, such as the Egyptians, Syrians and Chinese, in the Museum. The Greeks think that the Elgin Marbles are better seen in context in Athens, within the framework of the city that once created the Parthenon.¹⁷²

Neither side can completely dismiss the other one’s argument as being baseless. Certainly there is something to be gained from comparison, just as there is

¹⁷⁰ Merryman, 1988, p. 497. See also King, 2006, pp. 307-308

¹⁷¹ Merryman, 1988, pp. 497-498

¹⁷² King, 2006, pp. 298-299

something to be gained from the physical connection to the object's origins – or perhaps rather something lost without such a connection. King, however, does not agree that any understanding is lost if the Parthenon Sculptures are not in their original place in Athens. On the one hand, “[s]ince we are no longer pagans who worship the Olympian gods, neither we British nor the Greeks could ever fully understand the Parthenon and interact with it in the way originally intended”, and on the other hand, “[m]odern Athens ... is not the context in which the Parthenon was produced; the city shares the coincidence of the same geography, but neither the same culture, nor the same religion.”¹⁷³

On why the universal museum is a better context, King argues: “[m]useums are often a better place to study art because there, under one roof, are works from many countries and many periods, and one is able to compare and contrast them.”¹⁷⁴ However, even she herself states that, even though a universal museum is apparently preferred, it is certainly not the only possible venue for appreciating such pieces, and that they indeed do have value wherever they might be displayed.¹⁷⁵ One critique is voiced by William St Clair:

But, in any case, the idea that a museum in a northern country is the best context in which to appreciate an ancient monument such as the Parthenon is absurd. As a friend of mine from Eastern Europe said when she heard this line being offered on television by the previous British Museum director. Is he saying I cannot appreciate the Alhambra by going to Spain to look at it because there are no Greek temples nearby? Is he suggesting that parts of the Alhambra should be broken off and sent to museums which have strong collections of Chinese art?¹⁷⁶

But a different counterargument comes from critique of the idea of the universal museum. For one, they have been accused of being a form of idolization of the imperialistic past of, for example, Great Britain,¹⁷⁷ but another critique is that the so-called universal museum of today, which claims to adhere to the ideal set already in the Enlightenment, does not actually follow those principles.

The world's art, so the argument ran, should no longer be the private preserve of aristocracies. The general public too should be given some experience of the greatest

¹⁷³ *Id.*, pp. 308-309

¹⁷⁴ *Id.*, p. 312

¹⁷⁵ *Id.*, pp. 312-313

¹⁷⁶ St Clair, 2006, pp. 94-95

¹⁷⁷ *Id.*, p. 302. On the other hand, King argues, “the Greeks themselves have turned the Parthenon into a symbol of Greekness that represents their own ‘glorious’ past, the time when Athens had a great Empire, when the Athenians subjugated fellow Greeks, slaughtered and crucified those who objected.” See also St Clair, 2006, pp. 66-68

artistic achievements of the ancient and modern worlds, the originals of which were mostly in private palaces or in galleries in faraway countries. This genuine attempt to widen access was done, in the case of sculptures, by plaster casts; in the case of paintings, by having professional artists make excellent copies, engravings, and later photographs.¹⁷⁸

The current museums, however, break from these ideals in several important points. First of all, they are “only interested in showing original pieces.”¹⁷⁹ In addition, it is noted that even if all the collections were put together, the sample that they provided would still be small and unrepresentative of the actual variety of the cultures in the world, and the sample would be that of masterpieces of such cultures that were attracting to collectors and treasure hunters, instead of the mundane, but perhaps more representative portrayals of them, or cultures that the collectors were not interested in.¹⁸⁰ Finally, for example Jeannette Greenfield has stated that calling the British Museum “an international cultural institution ... is to perhaps confuse the nature of an institution with the nature of its collection.”¹⁸¹ To her, “[t]he British Museum is undeniably a national museum.”¹⁸²

4.3. “New home culture”

An argument often expressed in cultural property cases of high interest is that the presence of the object in the country where it has been relocated has also made the object the cultural property of that state, just like of the country of origin. Prott and O’Keefe call this the “Place in cultural history” argument.¹⁸³ The argument has been especially used in the Parthenon Sculptures case, where, for example, John Henry Merryman states that “[t]he Elgin Marbles and other works in the British Museum have entered British culture, help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship.”¹⁸⁴ Especially the impact of the Marbles on the British arts (especially both visual arts and literature) is often emphasized, as they have been the inspiration for many of the most notable artists in Britain.¹⁸⁵ For example Michael J. Reppas II has, however, countered these arguments by saying that the approximately 200 years that the marbles have been in Britain cannot

¹⁷⁸ St Clair, 2006, p. 94

¹⁷⁹ *Id.*, p. 94

¹⁸⁰ *Id.*, pp. 94-95; Prott & O’Keefe, 1989, p. 850

¹⁸¹ Greenfield, 2007, p. 63

¹⁸² *Id.*, p. 63

¹⁸³ Prott & O’Keefe, 1989, pp. 848-849

¹⁸⁴ Merryman, 1985, p. 1915

¹⁸⁵ King, 2006, pp. 299-300

possibly compare to the 2,500 years of history they have had with the Greeks.¹⁸⁶ He goes on by saying that “[a]lthough the influence of the Marbles on British art and scholarship should not be disregarded or belittled by any means, it seems quite plausible that their continued retention in England may serve more as a trophy from their colonial past, than as an integral part of their contemporary culture.”¹⁸⁷ Prott and O’Keefe also state that “[w]hile such complexities may justify sharing, they can hardly justify exclusion and other factors may need to be addressed where exchanges and loans cannot solve the conflict.”¹⁸⁸

4.4. Wrongful taking

One of the most important arguments in favor of return is ‘wrongful taking’ or ‘correcting historical wrongs’ argument. The essence of this argument is that in cases where the object at hand has been acquired wrongfully, restitution should be seen as a way to correct this wrong.¹⁸⁹ For Urice, obvious cases of wrongful acquisition are cases like theft, while “[w]orks acquired during periods of colonial occupation, wartime, or periods of civil unrest, for example, demand special scrutiny.”¹⁹⁰ But according to Prott and O’Keefe, “[t]his argument states that the taking of property (cultural and other) in colonial times was unlawful in international law and that the property should therefore be returned to the communities from which it had been illicitly appropriated.”¹⁹¹ However, often there were non-peaceful means by which the objects were removed that make the acquisition wrongful, and though there are many who support restoration simply on the basis of the removal of such objects by a colonial, more commonly there is an abuse of the colonialism involved that invokes this argument for the writer.¹⁹²

In fact, a great deal of the cultural property cases that arise are from situations involving imperialism or colonialism, or a country under foreign occupation. One such notable case – perhaps the most important restitution case from Africa – is the case of the Benin Bronzes. In 1897 the British launched a punitive expedition against the king (the Oba) of Benin, whose men (though apparently unknown by the king) had killed most in a group from the British Trading Post, who had been sent “with the purpose of

¹⁸⁶ Reppas, 1999, pp. 931-932

¹⁸⁷ *Id.*, p. 932

¹⁸⁸ Prott & O’Keefe, 1989, p. 849

¹⁸⁹ Greenfield, 2007, pp. xv, 412, 430-431

¹⁹⁰ Urice, 2006, p. 147

¹⁹¹ Prott & O’Keefe, 1989, pp. 838-839

¹⁹² *Id.*, pp. 838-839

reprimanding him for failure to keep a trading agreement”, even though the Oba had asked them to “refrain from coming at the moment because of a sacred ceremony”.¹⁹³ 1500 men were sent to take the capital, found it abandoned and proceeded to pillage the city, taking a great deal of the vast quantity of items found there. Notable were the hundreds of bronze items of very high quality, many of which were later sold all over the world in order to cover the costs of the expedition.¹⁹⁴

Although the city of Benin was not strictly under colonial rule at the time,¹⁹⁵ overall it is a fairly straightforward case of (excessive) use of colonial power. Still, a vast majority of the Bronzes are in Western museums like the British Museum and the Berlin Museum and few – though some – restitutions have been made, so there is far from a consensus that the wrongness of the situation is so powerful as to necessitate restitution. Similar arguments have been made in the Parthenon Sculptures case, as well as the case of the Nefertiti Bust. In neither of these cases, though, was there any violence involved. But both of them were conducted in imperialistic circumstances, and there have been accusations of abuse of power.¹⁹⁶

In the case of the Parthenon Sculptures, there is in fact a twofold imperialistic claim. On the one hand, the Greeks, who are considered the culture that created the sculptures (and so to whom they would belong), were under Ottoman rule. Therefore, they themselves did not have control over their own cultural property and had no say against the removal of the marbles. On the other hand, the sculptures were removed by the British ambassador, at a time when Britain’s power was at its highest and when the Ottomans viewed the French as a threat against which they needed an alliance with the British – who then had additional leverage with the Ottomans, in addition to their already powerful global position.¹⁹⁷ Lord Elgin has been accused of gross misuse of his office and stature. Most of this is based on the official letter, the *firman*¹⁹⁸, issued by the Ottoman authorities, that – at least in the remaining (also official) Italian translation – left it fairly open what

¹⁹³ Greenfield, 2007, p. 12

¹⁹⁴ *Id.*, pp. 122-129. “Described in an *Illustrated London News* account of that year as being ‘grotesque’, these bronzes were later hailed as great works of art.” (p. 123); Chamberlin, 1983, pp. 201-203

¹⁹⁵ Chamberlin, 1983, p. 194

¹⁹⁶ In general, see Greenfield, 2007, pp. 41-96, on the Parthenon Sculptures; and Siehr, 2006, pp. 114-134, on the Nefertiti Bust.

¹⁹⁷ Gazi, 1990b, p. 244; Reppas, 1999, pp. 922-923. For a comprehensive look into the background factors in the case, see for example St Clair, 1967.

¹⁹⁸ For the original Italian version of the letter, see British Museum: *Firman for Elgin*; for an English translation, see British Museum: *Firman translation*.

Elgin was actually allowed to do. Nevertheless, by most accounts (at least all accounts favoring restitution, and it is difficult to convincingly argue otherwise), the wording used in the *firman*, to erect scaffolding, reproduce the sculptures in drawings and plaster casts, and take “some [or ‘any’...] pieces of stone with inscriptions and figures”¹⁹⁹, meant that they were allowed to take with them any pieces of marbles they found in the ground while excavating, not remove anything from the buildings themselves. However, through a chain of incidents and coincidences, and apparently “more by chance and opportunity than design”²⁰⁰ (though, according to some, “through a succession of bribes and threats”²⁰¹), Elgin ended up removing over half of the remaining sculptures from the structure of the Parthenon itself and shipping them to Britain.²⁰² What is, however, used as a counterargument, is the fact that the Ottoman authorities (who were the legal authority in Athens at the time, even though some may argue it wasn’t for them to decide on the Parthenon) almost never opposed to the actions, and even if they did, eventually allowed it to continue. This amounts to the doctrine of tacit agreement, whereby the actions that Elgin did, although going beyond his original authorizations, were silently agreed upon.²⁰³ To this, some have countered with an incident where the Ottoman authorities did prevent Elgin’s ship from leaving.²⁰⁴ In addition, St Clair points out:

The military governor received payments in the first year alone equivalent to thirty-five times his annual salary. The governor was given more, and even larger amounts that do not appear in the accounts were paid to officials in Constantinople. ... The paradigm point is this. No administrative or judicial system can be expected to withstand such a weight of political influence and money. This is imperialism in action, destroying not only monuments but the local administrative and legal infrastructure.²⁰⁵

The case of the Nefertiti Bust relies most of all on the concept of *partage*. This was a system “by which a foreign archaeological team and the source nation would equally divide any objects found during excavations.”²⁰⁶ Although at the time it was a fairly common arrangement, the *partage* in the case of the Nefertiti Bust, as well as sometimes even in general, has been questioned as exploiting of the country where the

¹⁹⁹ Greenfield, 2007, p. 53

²⁰⁰ *Id.*, p. 61

²⁰¹ Reppas, 1999, p. 921. On the other hand, some claim that bribery was simply “normal practice” and so not condemnable. See for example Boardman, 2000, pp. 233-234

²⁰² Greenfield, 2007, pp. 51-54

²⁰³ Merryman, 1985, p. 1899

²⁰⁴ Reppas, 1999, pp. 949-950. However, the ship did eventually get to set sail (though only over a year later), which might negate this argument (see for example Merryman, 1985, p. 1899)

²⁰⁵ St Clair, 2006, p. 79

²⁰⁶ Merryman, 2006a, p. 9

excavation is being conducted which led to its eventual disuse.²⁰⁷ At the time, in 1912, Egypt was under British colonial rule, but the Nefertiti Bust was in fact excavated by a privately-funded German excavation team.²⁰⁸ There are two main questions that may be seen as wrongful in the Nefertiti Bust case. First of all, there were some uncertainties in the division of the finds: “it seems to be very likely that [the head of the excavation team, Ludwig] Borchardt, eager to preserve the bust of Nefertiti for Germany, either did not reveal the find to the Egyptian antiquities authority ... at all or diligently hid the bust underneath some unimportant antiquities or [the Egyptians’ representative, though French,] Gustave Lefebvre as an epigraphist and papyrologist did not recognize the importance of the bust of Nefertiti.”²⁰⁹ Stephen Urice, however, points out that Borchardt did in fact publish the bust already in 1913 “in an academic journal that would have been widely read and circulated among Egyptologists.”²¹⁰ Despite a partial image, Egypt’s antiquities officials would, according to Urice, know the bust is in Germany and would have known about its importance, yet made no claim (Urice does not present any factual proof of this, though²¹¹). The second argument regarding the wrongfulness of the removal of the Bust is, that at the time Egyptians were under colonial rule and had fairly little control over matters such as the dispersal of its antiquities. The Egyptian Antiquities authority was headed by foreigners (for a very long time by Frenchmen), and the division in the *partage* was overseen by the French Lefebvre.²¹² Urice, however, argues that *partage* was a commonly used and accepted system and in the case at hand, was not notably unbeneficial to Egypt.

Indeed the *partage* system created under Egyptian law benefited both Germany and Egypt exactly as intended: by offering tangible rewards for the risky investment in an archaeological expedition, Egypt gained knowledge of its own history and collections of antiquities acquired through scientific excavation. Germany gained prestige for discovery, valuable objects for its museums, and standing within the international archaeological community. Accordingly, it is difficult, if not impossible, to find any historical wrong that would be “righted” by return of the bust.²¹³

One final case involving colonialism worth comparing here is the Icelandic Manuscripts case between Iceland and Denmark, which revolved around a vast collection

²⁰⁷ Merryman, Elsen & Urice, 2007b, p. 414. Recently some scholars have, however, petitioned for the reinstatement of *partage*, denying the allegations of Western exploitation, insisting instead on its benefits for all parties. See for example Cuno, 2006, pp. 33-34

²⁰⁸ Merryman, 2006a, p. 9

²⁰⁹ Siehr, 2006, pp. 117-118

²¹⁰ Urice, 2006, p. 140

²¹¹ Whether it is as certain as Urice claims that the officials would have seen the journal and recognized the Bust is not possible for me to evaluate.

²¹² Siehr, 2006, p.132

²¹³ Urice, 2006, p. 147

of medieval manuscripts – and especially two priceless books (Codex Regius and Flateyjarbók) – written in Iceland and collected to Denmark (competing against Sweden) in late 17th and early 18th centuries.²¹⁴ There are several points of importance here: first, it has been said that the manuscripts are almost all the cultural property Iceland has, “the oldest living literature in Europe”²¹⁵, and the value of the manuscripts (especially the aforementioned books) is beyond measure; and second, it is one of the few instances where a return has been successfully agreed upon through diplomatic negotiations. At the time, Iceland was a colony of Denmark, and had little say in such a campaign launched by the Danish scholars (and, for the most part, probably did not have much interest, either).²¹⁶ However, when Iceland gained its independence, the cultural and ideological importance of the manuscripts had sunk into the national consensus of the Icelanders – they had played a great deal in the inspiration and justification for the independence campaign.²¹⁷ What ensued was a diplomatic and political arm-wrestle between the two nations that lasted for decades and at times enflamed the relations between them. Those in opposition of the return said that the manuscripts were in fact pan-Scandinavian and that Iceland would not be able to preserve them correctly (an argument discussed below). However, the result was gained purely through diplomatic negotiations without any legal action, and although the solution meant dividing the collection, this ensured not only that both the nations would be pleased with the result, but that by making sure that the scholars in each nation had steady access to the collections in each nation, the spirit of collaboration would continue. It also means that the Icelandic people can perhaps feel some sense of reconciliation with the cultural property that had been missing for over two centuries.²¹⁸

4.5. Ownership

There is one strong way, in a sense, to counter the wrongful taking argument (as well as, in essence, any argument), which is what Prott and O’Keefe call the “Ownership” argument:

²¹⁴ The books are medieval saga literature of Iceland and include some of the only surviving pieces of the famous mythologies of the age. The collection has been named after the Icelandic scholar Arní Magnússon, who was responsible for the physical collection of the majority of the manuscripts, scouring for them in the most unlikely places all around Iceland (including such used as padding in clothing (Magnusson, 2007, p. 3)). Magnússon had a chair in the University of Copenhagen, to which he bequeathed all the manuscripts he had collected (at least those that had survived the Great Fire of Copenhagen). For a full history of the Manuscripts (including the restitution debate), see Greenfield, 2007, pp. 13-40; Magnusson, 2007, pp. 1-4.

²¹⁵ Magnusson, 2007, p. 3

²¹⁶ Greenfield, 2007, p. 13

²¹⁷ Magnusson, 2007, pp. 3-4; Greenfield, 2007, p. 19

²¹⁸ Greenfield, 2007, pp. 13-40

A simple argument made by the holders of cultural property being sought by its country of origin is to rely on the *status quo*. Institutions in collecting countries have possession, have ownership according to their own domestic law and according to their view of international law. Why should they then hand over these goods?²¹⁹

The argument, as stated above, relies on the *status quo*.²²⁰ Of course, the laws (especially domestic laws) do support this stance, and there is little other states can do if the withholding country refuses to return the object or even cooperate altogether (there is, of course, always the possibility of raising a domestic case in the holding country – and on (rare) occasion such a case may even be successful).²²¹ There are very differing views on what the international law in the matter is, whether there is customary law and whether it is binding. While the retentionist argument is, of course, that there is no customary international law to compel return (at least in cases from prior to 1970 – the year of the Unesco 1970 treaty), some have argued that such a custom has emerged.²²² In the case of institutions like the British Museum, there are also laws in place that make it very difficult to make such a return, even if the museum itself would so wish to do. In Britain, such an action would apparently require an act of parliament.²²³ The other counterpoint against the ownership argument is that even though the law may be on their side, the moral argument has, or should have, considerable weight – and if the law is against morality, then often the law isn't considered just.²²⁴ Of course, a moral argument is always to some extent subjective – and as such debatable. Still, it can also be said, that “[t]he very nature of the question of restitution calls for opposing moral law to the *stricto sensu* juridical one.”²²⁵

4.6. Preservation

Most, if not all, would surely agree that the most important thing in regards to cultural property is the preservation of the objects (unless talking about very specific types of objects like human remains or objects with ritualistic or other use that are meant to be consumed – in this case opinions vary more). As an argument, it is almost exclusively used to support the retention of cultural property. Prott and O’Keefe list Conservation as an

²¹⁹ Prott & O’Keefe, 1989, p. 844

²²⁰ *Id.*, p. 844

²²¹ Reppas, 1999, pp. 945-946

²²² *Id.*, pp. 958-970

²²³ Greenfield, 2007, pp. 103-110

²²⁴ Prott & O’Keefe, 1989, pp. 844-845

²²⁵ Gazi, 1990a, p. 131

argument for retention,²²⁶ and in the value model of Bator, the Preservation value is a fundamental one.²²⁷

The most usual type of preservation argument is that the source nation does not have adequate facilities and resources to take care of the objects.²²⁸ This can, of course, be a legitimate concern and needs to be seriously considered. However, there are many responses to such a claim. First of all, “it is argued that this is *now* no excuse for non-return since such conditions can be provided, either in existing institutions, or by way of aid from the holding country, or from an international organization.”²²⁹ Also it is questioned whether such sophisticated conservation techniques are needed “since many of these objects originally came from a tropical environment and were conserved by local craftsmen long before their removal from the country of origin”, although there is always the possibility that the exposure to the new conditions has made the item more susceptible to decay in the original conditions.²³⁰ Another important way the conservation argument is used is not so much about the preservation of the object but rather its security. There have been occasions of theft soon after the objects’ restitution, for example, “it has been reported that objects returned to Zaire from Belgium [in 1976] have reappeared on the international market.”²³¹

The greatest risk in this argument is that it is used as an excuse from considering any restitution claims, as very few institutions can match the facilities of, for instance, the British Museum. In this way, it could always be argued that in restitution there is a greater risk to the object than at the current location, and that the *status quo* should be retained. There is a high risk of imperialism in this kind of thinking, since the Western states that retain these objects are in a notably better financial position than many of the countries claiming restitution and can probably stay one step ahead of most of the countries of origin, in terms of preservation capabilities. However, even if a state has weaker facilities for conservation of cultural property, it doesn’t mean the facilities aren’t

²²⁶ *Id.*, pp. 847-848

²²⁷ Bator, 1982, pp. 295-298

²²⁸ For example in the Benin Bronzes case, the British Museum eventually backed out on a loan of an ivory mask it had already agreed upon with Nigeria, saying that the item in question cannot leave its carefully controlled environment. To the Nigerians this seemed disingenuous, as in Nigeria was the original place where the item had been made and stored, while the British Museum countered that it was the worst possible environment to begin with. (Chamberlin, 1983, p. 204)

²²⁹ Prott & O’Keefe, 1989, p. 848

²³⁰ *Id.*, p. 848

²³¹ Greenfield, 2007, p. 410; Hallman, 2005, p. 215

good enough.²³² And, as already stated, one possibility is that if the source country doesn't have proper capabilities for preservation, the other state could support them.²³³ After all, when considering things like justice, one cannot only consider the present but also the past is to be taken into consideration, and if the *status quo* is to be preserved, then the future must also be in consideration.

As usual, the preservation argument has been actively used in the Parthenon Sculptures case. The biggest problem in regards to sending the marbles to Athens has been the intense air pollution the marbles left in the Parthenon have suffered from.²³⁴ Acid rains have dissolved a lot of the surface remaining marbles and the ones taken by Elgin have a distinct difference in level of preservation (of course, Elgin took those best preserved to begin with).²³⁵ While this was a very legitimate claim some decades ago, in recent times there has been a significant change in circumstances that question this argument. To begin with, the city of Athens successfully took steps to bring down at least some of the pollution levels in the city. The real difference is, however, the construction of the Acropolis Museum which was finally finished in 2009. This is where the marbles would now be situated in, in a dedicated space under expert care (that cannot be said to be notably worse than that which the Sculptures receive in the British Museum), so it could not be claimed that the Sculptures would be in any more danger there.²³⁶ In this way, the claim acts as a valid argument for retention up until a certain point, but for future retention has lost much (if not all) of its basis. Often the argument also goes, that if Elgin wouldn't have removed the Marbles for the British, someone else – quite likely the French – would have.²³⁷ The same argument was in use already by the French in the invasion of Italy in the end of the 18th century.²³⁸

In addition, the large Western museums themselves do not have a perfect track record of safe preservation of the objects. Even regarding the Parthenon Sculptures in the British Museum, it has become revealed that in addition to the damage done in the

²³² See for example Gazi, 1990a, p. 132; Goepfert, 1995, p. 514

²³³ Prott & O'Keede, 1989, p. 848

²³⁴ Reppas, 1999, pp. 936-938

²³⁵ King, 2006, p. 305-306;

²³⁶ Reppas, 1999, pp. 936-937. The idea of situating the Marbles anywhere other than physically back to the Parthenon (even if they would be within view of it) does, however, raise other objections regarding the meaningfulness of such a relocation (from one museum to another; this is discussed further in chapter 4.9.). It has, however, been argued that the way the Marbles are placed in the British Museum also distorts the view and understanding of the Marbles (Gazi, 1990b, p. 246)

²³⁷ Merryman, 1985, pp. 1905-1906

²³⁸ Merryman, 2005, p. 15

extraction phase, there has been great damage inflicted upon them during their stay in the British Museum. In 1930, the marbles were being moved to a new location in the Museum, the Duveen Gallery, funded by the now-infamous arts dealer Robert Duveen. During this project, Duveen had the sculptures scrubbed of their rather brown patina, so as to adhere to the image of whiteness the general public associated with ancient marble statuary (a picture which was, in fact, false, as even at the time experts knew that in ancient times the statues had been painted with bright colors)²³⁹. This was done with methods that were even at the time coarse, at times even removing the original sculpting marks (and of course the patina which would hold important trails for modern researchers to study, for example, the paint used) and did damage that, according to some, “cannot be exaggerated”²⁴⁰. The job was not finished, however, and some of the marbles still have borders between the scrubbed and unscrubbed surfaces. After the damage was understood by the museum staff, it seems that the whole affair was also covered up as best as possible, only to be revealed as late as 1984 by excerpts from a curator’s diary.²⁴¹ On the other hand, Dorothy King has argued that similar techniques have been used in Greece until much later, and that the lack of openness makes it much more difficult to know what types of methods the Sculptures in Greece have been cleaned with:

The British Museum has to disclose information about the Parthenon Marbles in London under the Freedom of Information Act. There is no such law in Greece, and curators have not been forthcoming about past cleanings of the Athens marbles, so we will never know what was done to them over the years. We only know that the Greeks continued to ‘clean’ ancient sculpture with steel chisels long after the British abandoned this technique as too abrasive.²⁴²

4.7. Accessibility, ambassador

An interesting point of discussion in the cultural property debate relates to – although is clearly distinct from – the discussion about proper context. A common claim by those in support of the universal museums is that in such a museum, the objects are seen by far more people than in their original context, and so also educates the public about art from

²³⁹ St Clair, 2006, p. 82 (and in general, pp. 82-94)

²⁴⁰ Reppas, 1999, p. 938

²⁴¹ *Id.*, pp. 938-944. On the other hand, some claim the damage done at this point has been highly exaggerated by William St Clair who first wrote about them, that his account was erroneous and that the account was never covered up like he claimed. See Jenkins, 2001; Boardman, 2000 pp.241-257.

²⁴² King, 2006, p. 307; on her observations regarding the condition of the Athens marbles, and some speculations about aggressive cleaning methods based on the “surprising, even shocking” whiteness of the marbles there, pp. 306-307

outside their culture and knowledge, inspires future art and research, and, probably most importantly, advances cultural coexistence and collaboration. On the other hand, the other side argues that in the West, the pieces are only seen by a limited, well-doing few (who would usually also be able to afford to visit them anywhere else), and such a location excludes a majority of the people in the world, especially those in the poor Third World countries where the pieces originate from. This is a many-sided argument, and is often infused with other arguments. In the value-based categorization, Urice lists the value of ‘making art known, visible and accessible’, which is very similar to the ‘art as good ambassador’ value.²⁴³ Prott and O’Keefe also have the ‘access’ argument.²⁴⁴

Of course, the argument about the objects working as a cultural ambassador is applicable to all restitution cases, and in itself does not differ from case to case. The idea is that when an art-rich country lets its art spread into museums around the world, it “stimulates interest in, understanding of, and sympathy and admiration for that country.”²⁴⁵ In addition, “an equitable distribution of a nation’s cultural property also contributes to a breakdown in parochialism and builds mutual respect and admiration for other cultural traditions.”²⁴⁶

In many of the cases under comparison here, the argument has been made that the bringing of the items into the Western museums is what has made them so famous and valuable and iconic in the first place (as has already been mentioned). And the boom hasn’t only included the specific cultural objects, but all the cultural property of the culture which has produced them. Through the acquisition of these objects into the great museums, it is said, the ancient Greeks and Egyptians (and any other such cultures) have gained newfound prestige and respect for their achievements.²⁴⁷ For example, when the Parthenon Sculptures became available in Britain, “[o]ne result was that Greek superseded Roman art as the ideal, both in high and in popular culture.”²⁴⁸ Another result, according to J.

²⁴³ Urice, 2006, pp. 148-151, 154

²⁴⁴ Prott & O’Keefe, 1989, pp. 845-847. Many of these values are represented in the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property: “the circulation of cultural property... is a powerful means of promoting mutual understanding and appreciation among nations. [A] systematic policy of exchanges..., would not only be enriching to all parties but would also lead to a better use of the international community’s cultural heritage which is the sum of all the national heritages.” (Merryman, 1998b, p. 11, quoting the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property, Nov. 26, 1976, preamble)

²⁴⁵ Bator, 1982, p. 306

²⁴⁶ Urice, 2006, p. 154

²⁴⁷ King, 2006, p. 299

²⁴⁸ Merryman, 1985, p. 1908

Rothenberger, was that the whole attitude towards antiques changed: they were no longer seen as primarily decorative, but rather as educational and public objects.²⁴⁹ Merryman argues in similar lines, saying, that “[b]y their removal to London and exposure in the British Museum, they have brought admiration and respect for the Greek achievement” and that “[i]n the most important sense the Greek cultural heritage has been preserved, arguably enhanced, by the British acquisition and display of the Marbles.”²⁵⁰ Similarly, a newfound boom of Egyptology coincided with the publicizing of many of the most important Egyptian artifacts, as has been mentioned before.²⁵¹

In a way an even larger impact was created by the Benin Bronzes. According to Neil MacGregor the Bronzes “did more than anything else to change European perceptions of Africa.”²⁵² Once they became revealed – and clear that they were, in fact, African (and not, for example, from Atlantis, as some speculated)²⁵³ – “a whole set of stereotypes collapsed; a whole set of hierarchies disintegrated”²⁵⁴ and African culture overall became appreciated as more than just that of primitives and inferior to the Europeans.²⁵⁵

There are also advantages still to be gained. According to Bator, “[g]iving foreigners a taste of a nation's art by allowing export will attract foreign scholars, students, and tourists to visit that country and study its art; this can in turn stimulate and enrich that country's intellectual life.”²⁵⁶ The benefits aren't only economic, or national, as “a more cosmopolitan learning and better international understanding result from exposure to the works of other cultures.”²⁵⁷

Finally, there is the question of access (or distribution). This can be understood in several ways. Merryman explains this principle in general terms: “that all of mankind has a reasonable opportunity for access to its own and other people's cultural achievements.”²⁵⁸ Most often the argument is understood as maximizing the amount of people that can see the pieces in question, for artistic reasons, and by the accessibility for

²⁴⁹ *Id.*, 1908

²⁵⁰ *Id.*, p. 1913

²⁵¹ Miles, 2008, pp. 328-329

²⁵² MacGregor, 2009, p. 51

²⁵³ *Id.*, pp. 51-52

²⁵⁴ *Id.*, p. 52

²⁵⁵ Greenfield, 2007, pp. 410-411; Klug, 2010, p. 722; Chamberlin, 1983, p. 194

²⁵⁶ Bator, 1982, p. 306

²⁵⁷ Merryman, 1988, p. 506

²⁵⁸ Merryman, 1985, p. 1919

scholarly research – because “[p]resumably, we preserve art so that it can be seen and known and studied, so that it can exercise its power over us, so that it can add to our store of knowledge.”²⁵⁹ It is, naturally, important that the pieces of cultural property don’t just lay unused and unseen in storage. The argument is usually given in favor of retention of the objects: where they are being held, far more people will be able to have access to them, because of either the popularity of the location overall (for example, as a tourist hub – like London), or as a safe, secure and accessible location to visit, or due to the way the supply of cultural property is handled in the other country (how they are held in storage (or on display), accessibility for scholars, bureaucracy). Especially in regards to the British Museum these arguments are often deployed, speaking of the centrality and safety of London, and its openness for scholarly research. For example, Dorothy King recites her personal experiences of difficulties when studying Greek archaeological sculptures in Greece,²⁶⁰ while the Marbles in the British Museum “could not be more accessible than they are now.”²⁶¹

These last-mentioned arguments have received lots of strong criticism. Critics claim that these ideas are merely nationalist arguments disguised in internationalist rhetoric, and in fact maintain the imperialist attitude that was responsible for receiving these items in the first place. It is also said, that such an internationalist view “advances the distrusting view that antiquities are the property of all humankind for both highly-developed and under-developed nations, but safe for display only in westernized nations” (dealing also with the protection argument) and that “by forcing art-rich nations to ‘disperse’ their cultural assets, ‘western’ nations are essentially stealing.”²⁶²

Another problem, perhaps an even more important one, is “that all the museums that fall into the ‘universal’ category are in the Western States.”²⁶³ Such a location excludes all the poor people around the world and especially those from Third World countries (where the objects often originate from) and “not one is easily accessible to scholars in developing countries.”²⁶⁴ This means that scholars from the items’ originating country are hindered in the research of their own culture. Any bad relations of the museums currently holding the items with the items’ country of origin “could in the

²⁵⁹ Bator, 1982, p. 299

²⁶⁰ King, 2006, pp. 304-305

²⁶¹ Boardman, 2000, p. 260

²⁶² Klug, 2010. p. 720

²⁶³ Prott & O’Keefe, 1989, p. 846

²⁶⁴ *Id.*, p. 850

long run seriously impair the opportunities for research and collection abroad.”²⁶⁵ If, instead, good relations were upheld (through restitution and cooperation projects), it would be an advantage for both the parties (and the public overall through better research).²⁶⁶ It is often added that those in the rich Western countries would instead have much better prerequisites for seeing the objects in their source nations, while there also would be the chance for the locals to see the items.²⁶⁷ Elazar Barkan also disputes that the Western museums would be so much more open in their collections, saying instead, “that major museums hoard, and deny access to, multitudes of objects in their basements.”²⁶⁸ Finally, it could be argued that where the tourists now flock to see certain high-profile cultural objects in a museum in one place, if the object were transferred to a different (the original) location, some, if not most, of those tourists would go see them in the other location.

To be considered with the values relating to scholarly and other such access is also one interesting point of discussion relating to the Rosetta Stone,²⁶⁹ one which here could be called the usefulness argument. Regarding the Rosetta Stone, there have been – often as a side-note discussing other cases – many mentions of its past contribution to science, as it was the key to understanding Egyptian hieroglyphs. The interesting thing is that what this past importance means for authors in regards to its allocation. King, arguing against the return of the Parthenon Sculptures, says that because of its importance in unlocking the hieroglyphics and giving access to “several thousand years of history and ancient culture in Egypt”,²⁷⁰ there is a much better case for restitution. It is, King apparently argues, the link between modern and ancient Egypt, while the Parthenon Sculptures (not even being the best ancient Greek sculpture available)²⁷¹, have no such meaning.²⁷² On the other hand, Christopher Hitchens, arguing for the return of the

²⁶⁵ *Id.*, p. 844

²⁶⁶ *Id.*, pp. 843-844 (the “dynamics of collecting” argument)

²⁶⁷ *Id.*, pp. 846-847; St Clair, 2006, pp. 94-95. Prott & O’Keefe also argue that “[i]f universal museums are essential, then there should be one on at least each continent, not all concentrated in the same socio-cultural area.” (p. 846)

²⁶⁸ Barkan, 2002, p. 31. The same is said by Patty Gerstenblith: “However, the museums of North America and Western Europe are also filled with art works and antiquities, which are often in storage, displayed occasionally, sometimes uncatalogued and not necessarily accessible to either the general public or for scholarly research. This may well be part of good museum practice, but museums in archaeologically-rich countries also have reasons for what is displayed or not, and for keeping excavated material in the region, and they should not be singled out for practices that are normal elsewhere.” (Gerstenblith, 2001, p. 209)

²⁶⁹ On the history of the Rosetta Stone as well as arguments for retention, see Shuart, 2004.

²⁷⁰ King, 2006, p. 310

²⁷¹ *Id.*, p. 305

²⁷² *Id.*, p. 310. King does not, however, seem to actually endorse the return – stating only that “on purely technical grounds” the return would make more sense than the return of the Marbles, but implying that other factors do not support such an action for the Rosetta Stone either.

Parthenon Sculptures, states that “[t]he Rosetta Stone belongs to humanity²⁷³, in that it helped the world decode a script that is no longer in Egyptian usage, and is as well off in the British Museum or in the Louvre, or, if chance had so dictated, in the national museum in Cairo.”²⁷⁴ Hitchens draws on the fact that it doesn’t have any inherent meaning for the current Egyptians, and was utilized by the world in collaboration when solving the hieroglyphs, so there is no need for its return.²⁷⁵

Stephen Urice has also hoped to raise a new value that is related to that of access: ‘protecting the stream of creative expression’.

Living artists rely on and react to their predecessors; they create new works in the context of the creative expressions. As the individuals who maintain the ancient tradition of creating cultural heritage, they have interests that are entitled to special consideration in cultural property discussions.²⁷⁶

There are many types of artistic and cultural endeavors that require access to such creations of the past.²⁷⁷ To support the continuation of such creativity, these artist need to be given access to pieces that might not be quite as accessible otherwise. As an example of this, he raises a case regarding the Nefertiti Bust, the work called *The Body of Nefertiti*. This was a case of “appropriation art”; that is, not merely using earlier works (and other objects) as inspiration but incorporating them in the new work.²⁷⁸ In 2003 two Hungarian artists used the Bust as basis to create a bronze figure – the rest of the body – proportionate to the bust. In the same year, the sculpture was taken to the Egyptian Museum in Berlin, and for a short while the head was attached to the body, to create a complex installation piece, including a “full” figure of Nefertiti. The Egyptian officials’ reaction, however, was extremely negative, culminating in the head of Egypt’s Supreme Council of Antiquities proclaiming that the head of the Berlin Museum (and his wife) would be banned from all future excavations in Egypt, and that any Egyptian officials should not cooperate with

²⁷³ In accordance with the basic idea of cultural internationalism, as opposed to the cultural nationalistic idea of the piece belonging to the Egyptian nation.

²⁷⁴ Hitchens, 2008b, p. xxii

²⁷⁵ The argument of course follows that the Parthenon Sculptures, on the other hand, do have such meaning – directly conflicting the view held by King. These arguments about the Rosetta Stone are also made by Stuart, 2004, pp. 695-697

²⁷⁶ Urice, 2006, p. 156

²⁷⁷ And, in fact, art is always based on inspiration from past art (even if the new piece is a kind of antithesis to the old). *Id.*, pp. 156-157

²⁷⁸ *Id.*, pp. 157-162

them in any way. In other words, then, the piece wouldn't have been allowed such usage in Egypt, and the stream of creative expression would have been halted.²⁷⁹

4.8. Domino effect

A kind of last-resort argument, yet also one that tends to be applicable in all cases (and is often voiced, especially by those speaking on behalf of the universal museums), is the 'need to maintain Western collections', or 'domino effect' argument.²⁸⁰ Urice speaks of the 'floodgates concern'.²⁸¹ Many of those arguing for the retention of cultural property, especially when speaking about very high-profile items like the Parthenon Sculptures and Nefertiti's Bust, have expressed a fear that if such items were made to be returned, this would set a precedent of restitution, as a result of which "any country who owns and displays a work originating from another country would be subject to the claim of superior title by the country of origin".²⁸² The result would be that a high-profile return (like that of the Marbles) would result in "the universal removal of major acquisitions of the world's museums" and "museums as we know them today, will be destroyed completely."²⁸³ Even accepting some smaller-profile requests might accomplish this, as such actions could cause a flood of requests to which the museums would no longer have an acceptable reason for denial.²⁸⁴ Perhaps even "the return of ... one object will lead to an uncontrolled and uncontrollable set of demands for return."²⁸⁵

This argument, however, has been refuted by the opposing side in the debate. Some argue that there is no tenability whatsoever in this claim. They say that since, for example, "the British Museum has already returned some objects to countries of origin ... this seems a strange argument."²⁸⁶ It is extremely rare (and not very credible) that such a

²⁷⁹ *Id.*, pp. 162-165. This is, of course, one important value amongst many others, as long as the piece itself is not harmed. There was no physical damage to the Bust during the process, but for example the aforementioned head of the Antiquities Council, Zahi Hawass, called the piece "a 'degradation' of the Bust, created in wanton disrespect". Whether this sort of "immaterial" damage is to be included in such an evaluation is, however, a matter better suited for consideration elsewhere.

²⁸⁰ Prott & O'Keefe, 1989, pp. 849-850

²⁸¹ Urice, 2006, pp. 154-156 (and lists yet another name used for the argument (coined by Daniel Shapiro), "the pandora's box")

²⁸² Reppas, 1999, p. 978. See also Ounanian, 2007, pp. 122-123

²⁸³ *Id.*, p. 978

²⁸⁴ Prott & O'Keefe, 1989, p. 849

²⁸⁵ Urice, 2006, p. 155

²⁸⁶ Prott & O'Keefe, 1989, p. 849. The same argument is made by Greenfield: "such 'returns' have taken place under different guises in the past and that it is by no means a novel occurrence setting into motion unacceptable precedents." (Greenfield, 2007, p. xiii)

demand for all items in foreign lands to be made,²⁸⁷ and when instead only one item is claimed for return, each claim will be handled on a case-by-case basis. And since in each situation the facts are different, there will not be a universal precedent set.²⁸⁸ Others do, however, say that what is established is – while not a universal precedent – “a very narrow precedent,”²⁸⁹ for example, in the case of the Parthenon Sculptures, a precedent focusing “solely upon *immoveable* property, not *moveable* property”²⁹⁰ because the sculptures are a part of the larger structure of the Parthenon and never meant to be removed or transferred from place to place.²⁹¹ Or, alternatively (and this would be a more common practice), a precedent focusing on the circumstances of the removal of the object. Where there have been morally wrongful means of acquiring the objects – for example deception, theft or pillage – there would be an obligation for return, while in a case where the objects have been acquired through legal and agreeable methods, no such obligation would be born.²⁹²

4.9. Integrity

One more argument to consider is the Set Value²⁹³, or, in other words, the integrity of an object, collection or monument. As Stephen Urice puts it:

Some objects of cultural property were intended to be independent works; others were intended to be components of a complex work. In situations in which an object of cultural property derives from a complex work or is part of a series or set, this set value is a relevant consideration in weighing a demand for return.

When a piece of cultural property is divided, “each [piece] has less cultural value when separated than as a unit.”²⁹⁴ The Set Value argument has been used for either side of the debate. John Henry Merryman has categorized the argument as internationalist, which has been criticized by Ana Sljivic. For her, “it is likely that integrity would, in many instances, lean in favor of location of the object in the source nation.”²⁹⁵

²⁸⁷ It is not unheard of, though – for example in 1965 Greece made such a demand. (King, 2006, p. 296)

²⁸⁸ Prott & O’Keefe, 1989, p. 849; Greenfield, 2007, p. xiii

²⁸⁹ Reppas, 1999, p. 979

²⁹⁰ *Id.*, p. 979

²⁹¹ *Id.*, p. 979

²⁹² Greenfield, 2007, p. xiii

²⁹³ Urice, 2006, pp. 147-148

²⁹⁴ Merryman, 1988, p. 503. This problem today is accentuated in the countless illegal excavations being conducted around the world, each irreplaceably destroying archaeological information due to the lack of documentation. According to Merryman: “[u]nless removal is accompanied by elaborate documentation of the site, it leads to the irreparable loss of cultural information. It is a form of destruction, a kind of vandalism.” (*Id.*, p.503)

²⁹⁵ Sljivic, 1998, p. 414 footnote 156

The Parthenon Sculptures are, once again, a prime example of the Set Value argumentation. Not only were they designed as an inseparable part of a yet much greater building (immoveable cultural property, as stated above), but as a whole they also “tell a story about religious belief and life in ancient Athens; a story only truly understood when the frieze is viewed as a whole.”²⁹⁶ When separated, the narrative is broken and the story the sculptures are meant to convey is missing important pieces. Christopher Hitchens has compared the division of the sculptures to that of sawing a painting like the Mona Lisa in half and shipping the two parts into different countries.²⁹⁷ Of course, some have argued that this unity is unachievable anyways – and so the argument loses much of its basis – as, “[i]n terms of sculpture, at most half is preserved.”²⁹⁸ Still, one could make a counterargument by asking that if a sculpture has irreplaceably lost some part(s) of it, would it be acceptable, then, to divide up the rest of it to different places. However, it is also true that in terms of the story the marbles have to tell, much of it is lost no matter if the remaining pieces are together or separate. And it cannot be claimed that in scholarly terms (in regard to the narrative of the sculptures) much would most likely be gained from the reuniting, as the research and reproductions have, for the most part, already been made. The question is more that of aesthetics. However, Andromache Gazi has argued that the way they are displayed in the British Museum distorts the view and understanding of the Marbles because it “is a display totally alien to the original placement of the sculptured panels on the monument.”²⁹⁹ In returning the pieces to Athens, there is also the problem that they would not be placed back on the Parthenon due to environmental hazards, but instead in the Acropolis Museum (as mentioned before). This has led those against restitution to question the meaningfulness of such a return, as in the museum the integrity of the Parthenon would be no more repaired than they are now.³⁰⁰ Those in favor of return, on the other hand, claim that in the Acropolis Museum the Marbles are in their original context, as well as in a more original display.³⁰¹

The situation is yet slightly different in the case of collections of items. Where in the case of the Parthenon Sculptures the integrity comes from their original immovability from the same structure, as well as the narrative they have to tell, the case of

²⁹⁶ Ounanian, 2007, p. 114

²⁹⁷ *Id.*, p. 114

²⁹⁸ King, 2006, p. 303

²⁹⁹ Gazi, 1990b, p. 246

³⁰⁰ Merryman, 1985, pp. 1918-1919. See also Shuart, 2004, pp. 675-676; King, 2006, p. 303

³⁰¹ Hitchens, 2008c, pp. 152-153; Greenfield, 2007, pp. 83-84; Gazi, 1990b, p. 246

collections (or *ensembles*) can be more difficult to determine. One could, for example, look at the case of the Benin Bronzes, where the multitude of items were from the same source, but have not been treated as a single collection, having rather been dispersed in a multitude of museums around the world.³⁰² In addition, there are duplicates of same and similar items – some of which have been the subject of return by the British Museum to Nigeria, precisely because they have been considered duplicate and, apparently, not a distinct part of an inseparable set (but rather a loose collection of similar items, but not clearly possessing separate value as a collection overall).³⁰³ A slightly more contested case is the Nefertiti Bust. Having been found in the remains of the workshop of the sculptor, Thutmose, with a range of other items, it has been suggested that, should Egypt determine that the collection and workshop is possible to re-establish in a museum, the set should be recollected.³⁰⁴ According to Kurt Siehr:

It has long been recognized by archaeologists, art historians, museum curators and even politicians that objects of cultural property should not be dismembered and, if this had happened in the past, such a mutilation of objets d'art should be stopped and dispersed pieces of an *ensemble* should be reassembled.³⁰⁵

Stephen Urice, however, denies that the Bust is a part of a collection, saying instead that it “is an independent work, not part of a complex work or a series requiring reunification to achieve full meaning.”³⁰⁶ Still, the majority of his arguments (though not as important as the first one) against restitution rely more on matters of practicality. According to him, the idea that all the pieces found in Thutmose’s workshop would be displayed together is unrealistic: in reality too many of the works found there are uninteresting to non-specialists (whom can easily access the pieces in the current museums), and displaying the Bust in such a way would be unpractical because of the quantity of visitors wishing to see it. The idea of reuniting sets also doesn’t resolve where such a unification should occur.³⁰⁷

³⁰² Greenfield, 2007, pp. 124-125

³⁰³ *Id.*, pp. 125-129

³⁰⁴ Siehr, 2006, pp. 126-128

³⁰⁵ *Id.*, 127 (emphasis original)

³⁰⁶ Urice, 2006, p. 148

³⁰⁷ *Id.*, p. 148. The argument about the reunification not necessarily meaning return (and hence not in itself working as an argument for restitution) has also been presented in the Parthenon Sculptures case.

5. Other Faces of Cultural Property

The previous chapter explored the arguments presented for the restitution and retention of cultural property. The debate revealed arguments that are common to many cases, but often have individual qualities between cases that make generalizations difficult. It also revealed that for almost every argument, there is a counter-argument, and that it is extremely difficult to come to any conclusions regarding the optimal allocation of cultural property. Now, before addressing the application of the structure of the debate, I will shift my focus to how both cultural property and the debate surrounding it can be used to advance other agendas, in order to show that these phenomena do not exist in a vacuum, but are, in fact, inextricably linked to real-world politics. What is shown is a field even more complex than at first revealed by the debate over restitution, but sometimes hidden in the rhetoric of cultural property in general.

5.1. Cultural property in history/memory politics

Heritage passions impact myriad realms of life today. They play a vital role in national and ethnic conflict, in racism and resurgent genetic determinism, in museum and commemorative policy, in global theft, illicit trade, and rising demands for repatriating art and antiquities. Decisions about what to conserve and what to jettison, about parenthood and adoption, about killing or converting or cossetting those of rival faiths all invoke heritage to explain how we feel and to validate how we act.³⁰⁸

Cultural property, for all its emotional and symbolic power (or, as Merryman said, *mana*), can be and often is “put to a variety of political uses in a variety of political contexts – ethnic, regional, and national”³⁰⁹, much like history overall (though it is important to keep ‘heritage’ and ‘history’ clearly separate from each other)³¹⁰. As has been suggested before, not all the discussion regarding the restitution of cultural property innocently considers only the most optimal location of the piece. There are various goals that the actors wish to attain through either the retention or restitution of the objects in debate.

In fact, James Cuno claims that cultural property overall is a political construct. This also means that it is “whatever one sovereign authority claims it to be.”³¹¹

³⁰⁸ Lowenthal, 1998, p. xiv. It is important to note that Lowenthal is speaking here of heritage in a very broad sense.

³⁰⁹ Merryman, 1989, p. 350

³¹⁰ “History explores and explains pasts grown ever more opaque over time; heritage clarifies pasts so as to infuse them with present purposes.” (Lowenthal, 1998, p. xv)

³¹¹ Cuno, 2008, p. 9

As something that is central to the identity of the people, Cuno does, however, speak against the inclusion of antiquities into this category. According to him, such items – usually made by people without much traditional similarity to the people in the same area now (sharing mainly just an approximate geographical location) – cannot have such a meaning to current people other than as a political tool for nation-building (which always also excludes other cultures that share or have shared the same location).³¹² On the other hand, one could argue that if there is a continuity from the people of a culture (even though the culture itself changes and perhaps is not recognized as the same culture anymore), and even if the people themselves do not explicitly recognize this connection, there is always some type of effect a past culture has on the culture in the present.³¹³

In a time of memory laws and restitutions of past atrocities such as the Holocaust, the restitution of cultural objects can be seen as one such way, among others, to ameliorate these old wounds.³¹⁴ However, some have also warned of the risk of the restitution movement taking “on the trappings of political correctness.”³¹⁵ As has been stated, cultural property also has had and continues to have a great role in building a national sense of identity, and so it is always an important tool for those in charge (and also gives them the capacity for shaping this identity in the direction they may wish). It is also a very important form of politics to decide who gets to decide on the cultural property in a nation. One extreme such example was the destruction of the Bamiyan Buddhas in Afghanistan. Upon not considering the giant, incomparable Buddha statues part of their cultural heritage,³¹⁶ the Taliban went on to destroy this symbol of “gods of the infidels”³¹⁷ as part of a religious-political purge of all non-Islamic material happening in the nation (the museums were also razed, one of the greatest iconoclasms of our time).³¹⁸ But although they claimed it was purely an internal matter, in addition to this being a scientifically and culturally important site for the whole world, it could also be considered

³¹² *Id.*, pp. 9-11

³¹³ Klug, 2010, p. 127

³¹⁴ “The demand that nations act morally and amend their own gross historical injustices is a relatively new phenomenon. ... Beginning at the end of World War II, however, and quickening since the end of the Cold War, morality and justice have received growing attention as international political questions.” (Barkan, 2002, p. 16)

³¹⁵ Klug, 2010, p. 721, quoting Solomon, Andrew: *Art in Jeopardy* in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law* (Fitz Gibson, Kate ed.), Rutgers University Press, New Brunswick, New Jersey, 2005, p. 239

³¹⁶ Gillman, 2010, p. 12

³¹⁷ *Id.*, p. 9

³¹⁸ Merryman, 2006b, p. 111

an ultimate act of declining Buddhists – especially in the East – of access to cultural heritage of theirs.³¹⁹

In a sense, this was also an act of building a sense of national identity, making sure that only the official form of Islam, supported by the Taliban, was to be promoted in the country.³²⁰ However, in its common form, such a use of cultural property is hardly as destructive, and very ordinary (in fact, it has in some form or another happened (and is happening) in every nation). An example from Mexico is provided by Merryman:

The National Museum of Anthropology in Mexico City is an example of an extraordinarily sophisticated and effective use of cultural property to instill a sense of national identity and national pride. Like other culturally diverse nations, Mexico has found it difficult to resolve nation-building problems. ... The Museum attempts to show the Mexican viewer that he is part of a great nation in which elements of native pre-Columbian and introduced European cultures have been combined to produce something important that is uniquely Mexican. Mexicans from remote villages grow perceptibly in stature as they move from room to room in the Museum, particularly on the upper floor, where the visual anthem to nationalism reaches a crescendo.³²¹

This kind of an exercise is not, however, limited only to Mexico, but can be seen in any state in the world, any national museum, or anywhere where a choice is made on what to put on display to represent a nation.³²² This exercise does not, however, need to be a conscious one. As cultural property is chosen to represent the identity of a nation, some is necessarily also left out, proving that this action of nation-building through cultural heritage is not necessarily at all as innocent and harmless as it may seem on the surface. It can be one form of (again, intentional or unintentional) structural discrimination and oppression, to leave some part of the population out of such a selection, perhaps with the intention of assimilation (such was also often the case in colonialism – removing the cultural property of the colonial subject, in order to deprive them of their original culture)³²³. The case of the Afo-A-Kom provides such an example (though in reverse); as

³¹⁹ Gillman, 2010, pp. 12-15. This also once again raises the question of who cultural property belongs to (discussed in the previous chapter). The purely nationalistic claim would be that the Buddhas had been the cultural property of the Afghan people, the statues residing within the jurisdiction of their state. However, “given the continuance of ‘Great Vehicle’ Buddhism in both cultures, Tibetan and Japanese Buddhists might reasonably think that the Buddhas were more a part of their heritage”, especially since “[i]t is clear that the Taliban didn’t consider the Buddhas to be part of their heritage.” (*Id.*, p. 12)

³²⁰ It can also be used as a way to promote a certain view of history, or even as pure propaganda. On how the Soviet Union used cultural property in this way, see Grimsted, 2010

³²¹ Merryman, 1989, p. 350

³²² Nation-building through cultural heritage is especially relevant in postcolonial countries. (Pieterse, 2005, p. 175). See also Davison, 2005

³²³ For example, the removal of the Throne of Menelik from Ethiopia by Italy was done with such intentions. See Prott & O’Keefe, 1989, p. 843

the outcry against the sale of the objects centered on its fundamental meaning to the tribe of the Kom people, “to Cameroonians concerned with nation-building, the Afo-A-Kom episode was at best an awkward event.”³²⁴ The history, as represented through cultural property, is also useful in identifying oneself with such historical antecedents that are seen as desirable, perhaps with the hopes of gaining some modern day prestige through historical roots.³²⁵

Legends of origin and endurance, of victory or calamity, project the present back, the past forward; they align us with forebears whose virtues we share and whose vices we shun. We are apt to call such communion history, but it is actually heritage.³²⁶

For example, in the case of the Pergamon altar, held currently in Berlin, both Greece and Turkey have identified themselves as the descendants of the cultures at the region at the time. In addition, Turkey has sought to de-emphasize its “imperial, Ottoman past” in order “to establish Anatolia (that is, the modern geography of Turkey) as ‘the cradle of civilization.’”³²⁷ Furthermore, in general, all of the West identifies itself clearly in a very specific historical target: “[j]ust like another product of the European Enlightenment, the ‘Nation,’ the ‘West’ has pushed to oblivion ‘the historical time of its non-existence’ and imagined itself as the descendant of a distant and imaginary antiquity.”³²⁸ In Greece, these kinds of perceived relations to ancient Greeks of Sparta and Athens was also used in order to oust the reigning Ottomans out in the 19th century.³²⁹

The destruction of the cultural property of a nation is an extreme method that has sometimes been used by conquerors in order to enforce an identity or culture that they see as fit or useful, or even merely for revenge. Colonial rule was no stranger to such action, as shown by the actions of Italy in Ethiopia (mentioned in the previous chapter).³³⁰ In World War II, as is known, the Nazis could be extremely ruthless, and, for example, in Poland they “gutted Old Warsaw to obliterate an icon of Polish identity that postwar Poles speedily rebuilt as a symbol of communal care.”³³¹ In China, such iconoclasm has

³²⁴ *Id.*, p. 351

³²⁵ Harrison, 2013, pp. 141-142. Such nation-building is, however, being challenged by globalization (*Id.*, pp. 142-144)

³²⁶ Lowenthal, 1998, p. xv

³²⁷ Bilsel, 2000, p. 8

³²⁸ *Id.*, p. 13

³²⁹ Lowenthal, 1998, p. 199

³³⁰ Prott & O’Keefe, 1989, p. 843

³³¹ Lowenthal, 1998, p. 26

apparently happened over and over again with the changes of dynasties, but most recently after Mao's rise into power. But in China, the culture also stresses words over matter.³³²

The thing about cultural property, of course, is that it can usually be adjusted to fit any agenda. The French revolution is a perfect example of this – after a phase of iconoclasm and wanton destruction of all things monarchical, the French actually turned to use the old symbols and remnants of the *ancien régime* into symbols of the republic and, most importantly, the Revolution. This was a nationalization of the formerly private heritage – a trend that would continue in later generations all around Europe and fundamentally change the way heritage in general was to be seen and understood.³³³ Cultural property is a way to alter views of the past. By promoting certain objects over others, by commemorating certain events in history (with, say, a monument) and leaving others without mention, is a way to alter the view of history of the public and promote a world view of choice of those making the decisions.³³⁴

Cultural property can also lend itself to purely political uses. For example, the return of the Crown of St. Stephen from the United States to Hungary in 1977 was considered to strengthen the socialist government's claim of legitimacy, which raised political opposition from politicians and expatriate Hungarians. Similarly, in a return of cultural property by the Netherlands to Indonesia, the act brought "personal gains for the politicians who could claim credit for the event; partisan gains for the political group in power in Indonesia at the time; a stronger cultural property base for nation-building in Indonesia, and so on."³³⁵ In Britain, Robert Lumley says, the cultural property debate is strongly political and both the Left and Right use the past as a vital source of legitimization.³³⁶ The political and popularity boost gained from being the person responsible for the securing the return of an iconic piece of cultural property like the Parthenon Sculptures would be massive, probably making the person a national hero, making the restitution movement all the more popular – though also risking politicizing the matter too far.³³⁷ In 2004 in Britain it was suggested that the Sculptures could be returned

³³² *Id.*, p. 20

³³³ *Id.*, pp. 63-66

³³⁴ See in general Lowenthal, 1998; Lumley, 2005, pp. 23-25; Graham, Ashworth & Tunbridge, 2005, pp. 30-31

³³⁵ Merryman, 1989, p. 351

³³⁶ Lumley, 2005, p. 17

³³⁷ *Id.*, p. 351. The same could also be true in reverse in Britain – it is possible that the government responsible for the restitution of the objects could be viewed in a negative light, though with the public being more in favor of return than in the past, it might also be seen as a positive thing.

to Athens in return for Greece's vote for Britain in the selection for the 2012 Olympic Games.³³⁸ It is also possible to use cultural property demands to pressure the government holding the objects in a completely unrelated matter, as Russell Chamberlin claims Nigeria has done with the Benin Bronzes towards Britain.³³⁹

Sometimes the accusation has been made that the debate surrounding cultural property is used to hide other issues. For example, according to John Boardman, Greek governments "have been unabashed in stirring up the marbles controversy at various times to mask other political dilemmas."³⁴⁰ On the other side of the debate, there are also claims that as some of the source nations are taking more strict actions against the deporting of cultural objects they see as the nation's cultural property, these "heavy-handed techniques have given commentators the justification they previously lacked to criticize the once-victimized source countries in the name of the museum community and private collectors."³⁴¹

This use of cultural property in politics has been summed up by Can Bilse:

[T]he discourse of restitution may gain a new dimension if we cease to consider archaeological artifacts as mere cultural goods, but acknowledge their role in the modern politics of memory. Central to the question of repatriation is not only the legitimacy of the acquisition but the right to associate one's collective identity with a powerful memory-image.³⁴²

5.2. Cultural property and imperialism

It has already been established that many pieces of cultural property in museums like the British Museum in Western states have been acquired with imperial power. In the history of cultural property we also saw that the idea of a centralized collection of the most magnificent art in the world has been an important part of warfare from Rome to Napoleon and all the way to Nazi Germany. And there is certainly a risk involved in claiming that the Western universal museums are the best possible placement for the cultural property of cultures anywhere in the world. It is no surprise, then, that the accusation has sometimes been made that these museums are upholding an imperialistic attitude or at least a longing for their imperialistic past.

³³⁸ King, 2006, p. 298

³³⁹ Chamberlin, 1983, p. 206

³⁴⁰ Boardman, 2000, p. 258

³⁴¹ Hoffman, 2010, p. 668

³⁴² Bilse, 2000, p. 15

A great deal of the first universal museums and exhibitions were quite clearly imperialistic by nature and method of acquisition. I have already talked about the many ways in which the colonial hosts exploited and plundered the colonized lands. But perhaps just as important in regards to the acquisition of cultural property was the indirect effect of the imperial power. It wasn't only that in cases such as the Parthenon Sculptures the representatives of the Empire would have tremendous leverage to pressure or coax the locals into giving or exchanging the objects, there were also, for example, many cases where the colonial subjects would present lavish gifts to the Queen or her representatives, for varying political purposes. For example many objects from India "appeared in the exhibitions as tokens of loyalty to the heir to Queen Victoria, newly created Empress of India, rather than examples of Indian manufacturers."³⁴³ The exhibition of such items can be seen also as show of power of the Empire, and many of such institutions were outspokenly "Imperial, rather than Metropolitan."³⁴⁴

The imperialism involved in the acquisition of the collections in universal museums (both in the way that the empires were able to gather the objects through their power, as well as the way the objects were often chosen as trophies) does not only mean that the collections may now uphold some remains of imperialism, there is also an effect already imprinted on both the receiver and source of the objects. The museum in itself can be seen as a kind of trophy case, and should the objects be returned, this would not change, as the objects would certainly not be in their actual use anymore. "Indeed, the repatriation of heritage objects often comes down to placing them in one's own museum – an act which perhaps establishes ownership, but only by reinterpreting cultural things in term of the ideas of those who plundered them."³⁴⁵ In addition, there was often another imperial narrative involved in the acquisition of such objects, where the justification for "the destruction of the context that gave the objects their original meaning by reconceptualising them as 'works of art' in accordance with post-romantic Western aesthetics."³⁴⁶

Although, as has been established, often the imperialistic means of acquisition of cultural property were morally questionable or outright wrongful, as also

³⁴³ Barringer, 1998, p.22

³⁴⁴ *Id.*, p. 14, quoting Robinson, J.C. (1858): 'Our national collection', *Athenaeum* 1587, 27/3: 403-4, p. 404

³⁴⁵ Handler, 1985, p. 194

³⁴⁶ St. Clair, 2006, p. 76

proven by the reactions of many of the members of the Empire,³⁴⁷ the actions were not usually (at least technically) illegal by the laws of the time. This fact has been used as an argument also in current debates about the restitution of cultural property, as without an illegal act of transfer, the current owners cannot (with very few exceptions) be compelled by law to return those object. Although this is a valid argument, it also carries a high risk of justification of past colonialism and upholding the imperialist attitudes of the past.

From the cultural nationalist view it is usually the internationalist that is imperialistic, and in fact even the whole idea of internationalism may seem as (not-so-)hidden imperialism. As the nationalist view focuses on the country of origin's right to its own cultural heritage, to such a view the idea that a state completely unrelated to it would not only claim that it is an equally valid place of holding the objects, but actually even a better one, would be a thoroughly imperialistic idea. It would suggest that such a state is claiming that it has a better position to determine over the cultural property over the state of origin. There are also certain allusions to the idea of "the white man's burden" in the idea of a benevolence of preservation in the Western states' collections of colonial cultural properties.³⁴⁸

The invocation of imperialism is of course also a history-political action. First of all, it can be that the (at least imagined) stability of the Empire of the past appeals to people bemoaning the instability of our current age.³⁴⁹ It also cannot be denied that the European colonizing states were superpowers in the world, something that can hardly be said in the post-colonial world with new economic powerhouses around the world. This made the situation for the powerful states much more secure. Secondly, upholding (even if unintentionally) certain imperialistic traditions means that those in charge have much more power especially in more indirect ways. Possessing masterpieces of cultural property means also great financial benefits especially in the form of tourism.

Obviously not everyone agrees about the imperialism of the universal museums. The internationalist ideology seems to do away with such an idea. For example, John Boardman talks about the fact that it does not matter where these objects are located,

³⁴⁷ For example, see Barringer, 1998, pp. 21-22 for one example of such opposition, stating that "[t]hese African trophies are unpleasantly reminiscent of the worst phase of British policy." (*Id.*, p. 22, quoting Conway, M. (1882): *Travels in South Kensington*, London: Trubner, p. 71)

³⁴⁸ Barkan, 2002, p. 37

³⁴⁹ And, according to Lumley, in the origins of the debate in Britain, cultural heritage was indeed seen as "primarily an attempt to avoid change by recalling nostalgic and romanticized presentations of the past." (Lumley, 2005, p. 15)

because wherever they are, they are fulfilling the purpose of acting as a cultural ambassador and educating and informing about the achievements of that culture. He denies it is imperialistic, rather stating that the values advanced by the works of art are irrespective of their location, whether in place of origin or elsewhere, that art always has the same, altruistic function.³⁵⁰ In his words: “[w]hen I see the obelisks on the Thames Embankment and in Central Park I see them not as loot, but as authentic tributes to the majestic achievements of ancient Egypt, and appreciate them in their quite different but no less evocative settings.”³⁵¹ Of course, this does not take into account that to the Egyptian (let alone to someone with more recent and more personal experience of appropriation of art) the view might be quite different. This is the view of the British citizen who is the receiver of the object of art – one whose “own” cultural property is seen very little outside its national borders. There is naturally a difference to be made between outspoken, intentional imperialism, and an unintentional, perhaps structural imperialism. But in the latter case, it can also be difficult to do away with altogether, if one is to still have such institutions as the universal museums exist.³⁵² And some institutions have taken steps to, for example, involve the indigenous groups more in the institutions’ activity.

6. From Apology to Utopia

The previous two chapters have revealed a complex debate surrounding the restitution of cultural property. The cultural property debate is built on two general viewpoints that have strong principles behind them, and both sides have strong arguments to justify their point and counter each other’s arguments, at the same time continuing the debate indefinitely. Although both sides use rhetoric that implies that their point of view is based on the best allocation of the objects in question, in truth neither side can escape from having real-world politics infused in them. In order to understand why it seems that the debate is not leading anywhere, I believe it is necessary to examine the debate in light of the theory of international law as presented by Martti Koskenniemi in his work *From Apology to Utopia*. The same kinds of patterns that define this view of international law also appear in the cultural property debate. In addition, I believe this comparison reveals that the principles of

³⁵⁰ Boardman, 2000, pp. 257-260

³⁵¹ *Id.*, p. 259

³⁵² And it is doubtful if anyone would actually wish for them not to exist, for they nevertheless hold great benefits for all humankind.

cultural nationalism and internationalism are not, in fact, as separate from each other as they might appear and claim to be.

6.1. International Law

In *From Apology to Utopia* Martti Koskenniemi deals with the functioning of public international law. After legal theorists gave up on traditional ways of justifying (international) legal order, the descending arguments of law being derived (“descending”) from a pre-existing system such as from God or natural law, there was a need for new justifications and reasons for why law was compelling in general. The liberal doctrine, then, came to try to fill this void. At first, the arguments were on the opposite side of the descending arguments – they were “ascending”, based purely on the will of the subjects and generalized from there. However, it was felt that this approach could not fully explain how those subjects could still be restrained, and it was felt that international law should be something separate from politics. So, descending elements were yet again added to the theories. But this also created the problem that the justification was again reliant on the descending patterns that the writers wished to do away with, which led to a kind of pendulum swing in the theories, where neither argument could fully satisfy the liberal view, but the ascending-descending explanations all had the problem of balancing.

Traditionally writers of international law have based their theories on the foundation of either the doctrine of sources, or the doctrine of sovereignty. The same kind of dichotomy is visible all throughout international legal argumentation, and in fact makes international law not so much a legal system as a legal language, a way for the lawyer to effectively argue any case.³⁵³ Or, put another way: “[i]nternational law is a structure of argument patterns.”³⁵⁴ Each argument or position on one side can be flipped to the other side, providing for an endless possibility for continuation of the international legal speech.³⁵⁵

A central theme of the book is the interplay of apology and utopia in international law. Any viewpoint can be criticized for being either too apologetic (that is, to simplify, granting too much power and leeway to the actors of international law – the

³⁵³ “... it is not an account of how legal decisions are made – it is about how they are *justified* in argument. A grammar is not a description of what native language-speakers say in fact – it is an account of *what is possible to say* in that language.” (emphasis original) Koskenniemi, 2005, p. 589. See also pp. 566-573.

³⁵⁴ Rasulov, 2006, p. 353

³⁵⁵ Koskenniemi, 2005, pp. 1-15

states) or utopian (being too idealistic and unrealizable in reality).³⁵⁶ The opposition will then take the position from the other end of the spectrum to justify their viewpoint. However, this opens it for the criticism on the other side. Basing one's argumentation on only one side makes the case too unreliable, as a truly acceptable position requires both "ideological" and "realistic" (i.e. descending and ascending) support. Any strong case, then, will require arguments of both types to be successful. But at the same time, the other side will be using the same arguments as criticism and to make their own point. This leads to an irresolvable situation, in which either side can keep arguing against the other side indefinitely.³⁵⁷

Each proposed solution will remain vulnerable to criticisms which are justified by the system itself. Moreover [sic], depending on which of the system's two contradictory demands one is led to emphasize, different – indeed contradictory – solutions can be made to seem equally acceptable.³⁵⁸

This argumentative cycle, then, cannot be broken from within the language of international law. External factors must be brought into the decision-making process, in order to produce a pragmatically plausible solution. This means focusing on the specific context of the case and applying the facts of the case in order to bring a conclusion to the cycle. In other words, international legal decisions are always political.³⁵⁹

As noted, this dualism is not limited to only this division of argument types, but is rather visible all throughout the very foundations of international law, as well as the theories of it. The view of international law as a language separates Koskenniemi's theory from those before that have seen international law as "just" another legal system, and in fact includes them inside it as part of the use of the language of international law. They, too, show the inherent dichotomy of the language. For example, each theory has always based its opening to international law in either sovereignty or the sources of international law – that is, whether the fundamental workings of the system are to be determined by the will of the individual states or by the principles set in the sources of international law (treaties etcetera). Still, merely sovereignty as the basis of international law in fact prevents the true functioning of the system because it is inherently a violation of sovereign rights and so doesn't have to be followed (or, to put it another way, has nothing to oblige the states to act accordingly and so collapses), and merely the sources as the basis still needs

³⁵⁶ *Id.*, pp. 24-28

³⁵⁷ *id.*, pp. 58-69

³⁵⁸ *Id.*, p. 69

³⁵⁹ *Id.*, pp. 588-589

the sovereign states to be the agents, and forgets the real politics that often work differently than the rules set in the sources.³⁶⁰ In the same way, when looking at the definition and birth of states, the starting point has been either the recognition of other states, or certain characteristics of a state, set in the sources. But neither approach works alone.³⁶¹

In here, too, we see apology and utopia in play. On the surface, the doctrines of sovereignty are clearly apologetic, as they are reliant on the will of the states, and alone would mean that anything the states say goes (as said, resulting in a lack of true international law because the definition of sovereignty requires that the will of the sovereign cannot be bound). The doctrines of sources are clearly utopian, because alone they are mere wishes, and the reality does not actually perfectly follow the principles and regulations defined in the sources (and alone would also result in a lack of true international law because the sources require the cooperation of states). But then again, on the one hand the idea of pure sovereignty is utopian as it is not possible to explain all sovereignty merely by factors of reality, and on the other hand for example the application and interpretation of the sources require some actors, bringing yet again the accusation of apology into play.³⁶²

6.2. Cultural Property debate

So, in short, international law is not in actuality like any legal order (that offers solutions to (legal) issues), but rather a language – to give the tools for the actors to argue in any case. This also applies to cultural nationalism and internationalism: although they are presented as solutions to the problems of where to situate cultural property, in reality they are merely the tools for argument regarding cultural property and cannot by themselves act as a tool for deciding where a cultural object actually belongs.³⁶³

If one looks at the different arguments in the cultural internationalism versus nationalism debate, it is not difficult to discover a similar structure of apology and utopia in it. Perhaps in the clearest way, the nationalist argument is the ascending and so the apologetic one, while the internationalist argument is the descending, utopian one – after

³⁶⁰ *Id.*, pp. 573-588. For a more in-depth analysis, see *Id.*, pp. 224-302 on sovereignty and pp. 303- 387 on sources.

³⁶¹ *Id.*, pp. 224-302

³⁶² *Id.*, pp. 300-303, 385-387

³⁶³ Of course, neither cultural nationalism nor internationalism is, or indeed can be, any more compelling an argument in itself. In decision-making, the weight of an argument is a matter of choice – they don't have any inherent hierarchy by themselves.

all, the deciding factor for cultural nationalism is the will of the states, while cultural internationalism uses argumentation regarding “higher” principles. Or, as put by Ana Sljivic, when speaking in terms of the ideas of Duncan Kennedy: “nationalism and its basis in state sovereignty is the ‘hard’ rhetoric; and internationalism, which elevates communal concerns and forms an exception of sorts to the dominant nature of nation-states, is the ‘soft’ rhetoric.”³⁶⁴

Both these sides have received critique from the other side that can easily be recognized as similar critique as that of apology and utopia in international legal discourse. The critique that has been given from the internationalist side against the nationalist side that the nationalistic ideology trivializes cultural property into an economic and political tool for national gain, leaving no room for the good of the item itself (or its most utilitarian use), is one such obvious accusation of apology. Similarly, the internationalist ideology is criticized for ignoring real-world circumstances (such as the difficulty of travel for most third-world citizens) and expecting things that simply are not feasible in the real world – an accusation of utopianism. Also many critics point out that the museums, too, with their universal goals and aspirations “do not – and arguably cannot – live up to these utopian goals.”³⁶⁵

However, as has been stated, the discourse works in a way that also turns each argument around, so that both sides uses both ascending and descending argumentation, and can be criticized of being both apologetic and utopist. When we look at the cultural nationalist side, although it is based on the idea of the home culture nation’s rights and authority, it also proposes ideas that have been criticized as being too unrealistic and utopian. For example, the many critiques regarding the protection of cultural property (from both physical harm and theft) in poorer countries, the concern over accessibility of the objects, as well as, in many ways, the fear of the domino effect of restitution can be seen as critique to say that the true realization of such an idea of pure and universal cultural nationalism is too implausible and would only work in a fictional utopia where all would be safe and everyone would have easy access to anywhere in the world.

Similarly, there are many apologetic sides in the way cultural internationalism is used in argument. Obvious is the way that the internationalists argue in

³⁶⁴ Sljivic, 1998, p. 430

³⁶⁵ Hoffman, 2010, p. 674

terms of an item becoming the national heritage of the holding culture, too, once it has been there long enough and had an impact – the usual example being the Parthenon Sculptures becoming British cultural heritage. Here they are purely using the nationalistic argument for their advantage. But also the actual internationalist arguments hold many apologetic sides to them: most of the “higher” ideals of internationalism are in practice left to the holding countries and museums to decide upon, and often the principles of protection and accessibility are used in such a way that purely secures the holding country’s possession – usually as decided by the holding country itself.³⁶⁶ In many ways the internationalist idea, at least in practice, is an apology of imperialism. It is, as has been mentioned, through a history of imperialism that a great deal of these objects have been collected. And there might indeed be some imperialistic attitudes still lingering, as suggested in the previous chapter. It could even be argued that for the objects to be best seen in a comparative context – as is often suggested – is actually a context of imperialism, as the method of acquisition for such collections is often purely imperial, and the selected cultures in such a collection are chosen through an imperialistic mindset.

The truth is that neither cultural nationalism nor internationalism could actually make a compelling case without arguments of both kinds. In the meanwhile, the same kind of indeterminacy as characterizes international law characterizes also cultural property debate: both sides’ conclusions are just as supportable by reason. In many ways, both sides can be seen as merely background assumptions of each individual – something that they inherently feel that is right – and to compel anyone to actually change their mind about such an assumption requires different kinds of (strong) arguments to back up the presented viewpoints.³⁶⁷

All – or at least most – participants of the debate seem to make a clear distinction between cultural property and politics – much like is done in international law. However, the truth is that such a distinction is a practical impossibility, as even the whole definition of cultural property is a matter of politics, and it is clear that cultural property is always used as a political instrument. At the same time, although there seems to be a desire to see cultural property as something purely outside something as “mundane” or secular as politics, almost all those in the debate have at least an element of it in the way they feel it

³⁶⁶ Not the least because the holding museums (especially in such cases as I have discussed) tend to be the leading institutions in their respective fields.

³⁶⁷ For a very concise example of such both-sided argumentation, see Reppas, 1999, p.933

should be decided upon. And, as has been apparent in the argumentation, it is almost a practical impossibility to separate from politics, at least in the way that cultural property is decided upon and understood now. Both sides also accuse the other side of reducing cultural property to something menial and secular – already mentioned was the way nationalism is accused of politicizing the matter, but in a similar way, internationalists are sometimes accused of commodifying cultural property in their demands for a more free international market.³⁶⁸

In a nutshell: the cultural property debate reveals a very similar indeterminacy as is inherent in international law discourse. Because both sides can be equally supported by reason and have equally compelling principles or ideals behind them, one cannot (at least without subjective bias) place one side over the other. This is also why both sides use also the other side's arguments.

To some extent the similarities in the debate can, of course, be explained through the fact that the cultural property debate is, in part, international legal debate. In purely legal terms, the problems are a question of international law, and so any qualities of that debate will also be visible in the cultural property debate. At the heart of the matter is the conflict between the rights of two sovereigns. Both sides have their equally valid principles of international law, and no such fundamental principles can be given true preference (if there was such preference, the whole debate would be moot). The roots of the discussion are, also, in the conflict of the ("secular") sovereign power and higher (moral) principles. At the same time there is the presence of the inviolability of the rights of the sovereign and their will to do as they will, but also of moral rules that do guide the actions of people and sovereigns, but also cannot be clearly defined and can have subjective interpretation. The moral side cannot be ignored, but it also cannot be given preference – for many reasons, one of them being that there is never a true clarity as to what the "right" thing is. Although many perhaps agree with the cultural nationalist that the correct location of a piece of cultural property is with its home culture, the internationalist can just as convincingly ask "why?"

One place where the "international law language" and "cultural property language" seem to differ more clearly is their history. In international law, the situation

³⁶⁸ Prott, 2005, p. 228. Prott also relates this type of internationalism to cultural imperialism.

was born from, so to say, a vertical conflict. The issue was the legitimization of the entire international legal order, how its undeniable existence can be explained when neither the ascending nor descending method is acceptable on their own. It is also quite purely an intellectual dilemma (although with real-world implications). In this sense, the cultural property issues rise from more horizontal conflicts. It is a history of attitudes and ideals that develop over time when cultures have taken from other cultures. But when one looks deeper into the history, there are also similarities present. In some ways, the verticality is represented in the conflict of the actions of the sovereigns and the moral justification for them, but more importantly, the development of the (essentially nationalist) ideals of every nation's right to their own cultural property is tied to the same development that led to the liberal view in international law that inescapably determines its indeterminacy. This development also shares the demands to separate the subject matter from politics.

7. Alternative Approaches

As already mentioned, for Koskenniemi the only way to escape the argumentation cycle (that is, to decide an international case) is to bring external factors into the decision-making. In cultural property debate, one way to escape the indeterminacy of the debate in cultural property restitution is to (fundamentally) change the way that cultural property is discussed – even to the extent of a paradigm shift. As the basic principles of the debate, cultural nationalism and internationalism also include the indeterminacy as a fundamental part of the debate. But although they are the established principles of understanding and defining the subject matter, many have also suggested different other ways to understand or govern cultural property. With such approaches, it might be possible to avoid the endless argumentation brought by the current circumstances. In this segment I will bring forward some different approaches as presented by different authors and contemplate on if and how they might break from the argumentation loop. Of course, whether there is a need for such a break is a completely different matter that I am not trying to press for one way or another. The point here is to see whether the alternative approaches could be a way forward if such an action were deemed necessary.

7.1. Cultural property as a non-renewable resource

Phyllis Mauch Messenger has presented the idea of approaching cultural property like a non-renewable resource, or an endangered species. The essence of the idea is summarized by Messenger:

So-called cultural properties are like environmentally endangered species. First, they are non-renewable resources; once exhausted or destroyed, they cannot be replenished or replaced. Second, they are not anyone's property and no one can properly be said to own them. Our relationship to them is more like that of a steward custodian, guardian, conservator, or trustee than that of a property owner.³⁶⁹

This approach means that instead of focusing on who should gain the benefit from cultural property, or who has the right to ownership, the focus should be on the preservation of the objects, bearing in mind that “[t]heir protection and preservation is a collective responsibility of all of us as stewards: it must acknowledge out important connection with the past, be conducted with care and a sense of responsibility for peoples and their cultural heritages, and respect for the context in which cultural remains are found.”³⁷⁰

With the non-renewable resource approach the whole terminology of the debate changes. Because the ideas of property and ownership that generally are used in the debate don't perfectly fit anymore, it would be inappropriate to continue using those terms. Messenger says that “a hierarchical model of conflict resolution simply is the wrong tool for the job if what one is trying to do is resolve competing claims about who has what communal responsibilities of care regarding the preservation of cultural heritages.”³⁷¹ What she suggests is an “integrative perspective” that focuses on the heritage-values of the objects (concerns that have less to do with property rights and more with culture and the importance of an object to the cultural identities), emphasizes preservation and understands the people as stewards, not owners of the objects and takes into consideration “the diversity of values and perspectives involved in the resolution of heritage issues.”³⁷² To her, this approach means resolving conflicts through alternative methods of conflict resolution, as well as collaboration projects such as loans and joint studies.³⁷³

³⁶⁹ Warren, 1999b, p. 19

³⁷⁰ *Id.*, p.19

³⁷¹ *Id.*, pp. 19-20

³⁷² *Id.*, pp. 20-21

³⁷³ *Id.*, pp. 19-22

While this approach certainly would mean a distinct difference to the very nation-oriented debate, it might not mean a complete change from the current situation. For one, this approach still doesn't suggest a clearly different way to solve the problem of where to situate the objects, and more importantly still focuses on a few key principles that are central in the internationalism-nationalism debate, especially the preservation principle. This way, nations still have ways of continuing the debate loop for their own benefit with some of the same tools as are in use now. The most important point in this approach is, however, that it would mean a shift away from thinking about cultural property in terms of ownership, but rather in terms of more utilitarian values. However, this is such a great step to take that it is questionable how successful it could really be. But were it to be successful, it would mean an great change in the cultural property debate.

7.2. Cultural property as Nietzschean aphorism

Tatiana Flessas has likened cultural property to an aphorism in the thinking of Friedrich Nietzsche. Unlike the previous approach, this is a way of defining cultural property (instead of a new approach to the functions and meaning of cultural property), and unlike usual definitions of cultural property – especially those in the legal instruments – it does not focus on the physical features of the actual objects, but rather “the approach taken ... is to look at the values that these definitions embody in order to understand the difference between ‘cultural property’ [and the objects] not protected by these legal instruments.”³⁷⁴ In all such definitions, there is always a “gap” for some value that is unexplainable and still integral.³⁷⁵

According to Flessas, “it becomes clear that the definitions of cultural property turn on the valorization and preservation of life, all sorts of life and all sorts of evidence of life.”³⁷⁶ In this sense, in the core of the cultural property is the interpretation that they evoke in the observer, and to Flessas this interpretation should be performed with the tools from the works of Friedrich Nietzsche, and his works regarding the values of values. The defining gain in cultural property is the acquirement of self-knowledge, but the objects never fully satisfy this desire:

³⁷⁴ Flessas, 2003, p. 1068. It should be noted that such a brief overview of the subject at hand cannot in full convey the original ideas in the full, and as such should not be viewed as an ideal summarization.

³⁷⁵ *Id.*, p. 1073

³⁷⁶ *Id.*, p. 1068

[T]he knowledge that is derived via the route of acquiring or studying cultural property will never be enough to satisfy its “seekers”. Fundamentally, it cannot meet the intensity or “truth” of the experience that is generated by, or packed into, the object or practice. ... The object/practice at issue cannot contain the knowledge sought; it is the space and the direction of the (desired) knowing that the cultural property opens up to and represents that must be liberated in order to understand the cultural property disputes. The para-rational investment in the object must be reconciled, within the language of the definition of cultural property, with the imperative of modern culture.³⁷⁷

Ultimately, “the cultural property functions a puzzle, creating, as well as accessing a/the place of *interpretation*, which is an interpretation in itself.”³⁷⁸ This is one principal way in which cultural property is a metaphor, and, according to Flessas, a Nietzschean metaphor in particular.³⁷⁹

Finally, the Nietzschean metaphor extends to the way that we deal with cultural property. The definition of (and the struggle to define) cultural property has arisen from a situation of destruction, looting and theft of cultural property, and a culture where “commentators fall back on the core self-justifying belief or principle in Western thought that the *true* owners of a culture are the people that *preserve* it.”³⁸⁰

In a landscape of assured loss ... the highest expression of ownership rights now requires that the true owner desire the culture’s (or object’s) preservation above all.³⁸¹

However, this leads the culture to a state of stasis – something that, according to Flessas, observers (who are not part of the culture) value, but the participants in that culture do not. By placing preservation above all, “then to make a claim regarding cultural property, and to do so using the law, is already to exist in a state of bad consciousness.”³⁸² This way is to maintain dead things, a Necropolis, where nothing is discarded but also not allowed “life” through continued use (and reinvention of the (always subjective) interpretation of (self-)knowledge). This also means that those who preserve things also remove any other choices from others, and “[t]here is only one way to value culture; there is only one correct posture for experiencing ‘life.’”³⁸³

The value of these objects should be diluted by the constant expansion of the field, yet it is the value of the values expressed in the definition of cultural property that becomes faint or

³⁷⁷ *Id.*, p. 1078

³⁷⁸ *Id.*, p. 1079 (emphasis original)

³⁷⁹ *Id.*, pp. 1079-1082

³⁸⁰ *Id.*, p. 1092 (emphasis original)

³⁸¹ *Id.*, pp. 1092-1093

³⁸² *Id.*, p. 1093

³⁸³ *Id.*, pp. 1088-1094

vague against the backdrop of a plethora of things. In a world of increasingly preserved and “valuable” things, it is not clear any more *why* they are valuable.³⁸⁴

Because the Nietzschean aphorism approach is actually a way to define cultural property instead of a new approach to what to do with it or how to govern it, it wouldn’t necessarily mean that it actually changes anything in the restitution-retention debate. However, because it is such a fundamentally different way of assessing cultural property, and especially because it compels the evaluation of life of the objects in question, it also forces one to rethink their approach to the way in which we preserve and utilize the property. If a museum is a Necropolis of dead things, then perhaps there is a need to have some of the objects back in a life where they’re in use, with the wisdom and knowledge that they represent put in practice, as well as newly infused to them. Flessas also has an interesting point into the way nationalism and internationalism function:

Knowledge of life continues to be the “object” of cultural property instruments, but it is knowledge *already possessed* rather than knowledge which is *missing or lost* that is at issue. In cultural nationalism, the underlying relationship to (the value of) knowledge is one of having rather than needing. All that is needed is the object that *expresses* the knowledge. In cultural internationalism, the object underwrites knowledge that might otherwise be “lost” or withheld, knowledge that is directly relevant to the past/future of “all mankind” or to human beings in an evolutionary sense.³⁸⁵

7.3. Cultural pragmatism

According to Matthew R. Hoffman, in the last decade or so “[t]he museum community recognized that the debate between cultural nationalism and cultural internationalism had become counter-productive and offensive to many source countries”³⁸⁶ which led to the development of a position (mainly inside the (American) museum community) he refers to as cultural pragmatism. The idea is to find a middle-ground between cultural nationalism and internationalism, through enhanced collaboration and respect between source countries and the countries and museums that hold the objects. In this way, the museums respect the source countries’ right to protect their own cultural property, but also the countries respect the work the museums do that enhances knowledge and appreciation for the objects and the cultures responsible for them.³⁸⁷

³⁸⁴ *Id.*, p. 1094

³⁸⁵ *Id.*, p. 1080, footnote 44

³⁸⁶ Hoffman, 2010, p. 685

³⁸⁷ *Id.*, pp. 685-686

The idea is that both sides would make compromises to accommodate all the relevant parties' needs, including not only the museums and source countries, but also especially the licit market of cultural property (in order to weaken the illicit market and all the damage it causes). Hoffman also suggests that states turn to the much praised Japanese model of cultural property protection, where there are different tiers (each with a different level of control) for cultural property of differing national importance, instead of the often extremely strict and one-sided cultural property laws now widely used. The states would be allowed to have an adjustment period where they would adapt their more strict restrictions into the new model (and assigning more cultural property than needed into the strictest controlled categories), and later when the supply and demand were manageable, would lower less-important objects into the more open categories.³⁸⁸

As an approach to cultural property, cultural pragmatism is, as its name suggests, a very sensible one. It is positive that the initiative for it has come from the American museums, so it is clear that it should be acceptable even wider in the museum community. Of course, the functioning of this approach depends heavily on the goodwill of the parties. Both the museums and the source countries would, in effect, have to let go of some of their claims to their cultural property and would have to trust that the other parties would keep true to the collaborations in good faith. The licit market of cultural property is also a slightly unknown factor – many believe that the greater acknowledgement of it would stem the tide of illicit trade, but there is no guarantee and there are those who would disagree. Of course, with the Japanese model the states would at least have a better say in what is acceptable to be let into the marketplace (but at the same time there would have to be a considerable amount of objects for the demand to be reasonably satisfied). There is also the question of how much leeway cultural pragmatism in action would still leave for the parties – if there was much that were left to them to still decide on, there would always be the potential for the debate to simply continue as it is now. As an approach, cultural pragmatism doesn't exactly do away with nationalism and internationalism, it simply tries to bring them closer together – which might not be as difficult a feat as it may seem due to the way both sides in fact rely on the same argumentations, as shown in the previous chapter. Either way, it is likely that more collaboration between the museums and source countries would benefit both of them, even if the debate surrounding cultural property did not change.

³⁸⁸ *Id.*, pp. 685-692; summary of the Japanese model at pp. 689-690.

8. Conclusion

It would seem that nothing is quite simple when it comes to cultural property. Starting from the fact that the term itself does not – and most likely cannot – have a set, unambiguous definition, cultural property continues to invoke a passionate response from all those involved with it. We can see in the history of cultural property that there is something inherent about it that goes beyond what you can simply reason with a very categorical approach. Be it the *mana* that Merryman has spoken of, or the “gap” in the Nietzschean aphorism, cultural property continues to invoke the passions and emotions of people as it has for as long as we have records of history. And cultural property is not something that matters on just a personal level – it is also essentially tied with the communities and other ties that bind people together, be it on a very intimate or a universal and global level.

The history of cultural property shows that there has always been that inherent *mana* about art (and cultural property overall), something that has made it seem special and extraordinary and, indeed, even worth waging war over. Part of its sanctity also comes from the fact that art was in Antiquity almost exclusively religious. There has been a slow but constant change in the way art has been viewed in society – the Romans were the first to institutionalize its plunder as an integral part of warfare; coming to the 17th century art had become a part of the private splendor and might of the sovereign, but started to again change into a public thing – but this time something especially *national* – during and after the French Revolution; and finally starting with the aftermath of the Battle of Waterloo, it began to be widely seen as something so inherently belonging to the people of origin that plunder came to be a war crime, and even war reparations were not to be taken from the cultural property of the people. This is illustrated by the fact that the 30 Years’ War was, indeed, the last case where the plunder of art in war (in a large scale) would go without redress. In all following cases – be it Napoleon or Hitler – there would be an effort by the victors to return all art that was taken to the place they were taken from, and finally after World War II to even judicially sentence those responsible for it.

The emotional charge in cultural property is obvious when looking at the restitution debate. It also exemplifies how fundamentally certain inherent background assumptions can alter the way we see the same situation. Neither the nationalist nor the internationalist side can argue that their point of view is any more fundamental or natural

than the other. Which side one feels more justified is, in fact, an unconscious personal choice, born from all the cultural and other factors that define a person and their opinions. That is also an important reason why a person arguing for either the retention or restitution of cultural property needs to use – even if somewhat secretly – both nationalist and internationalist arguments: it is extremely difficult to change someone's opinion on them, so it is rather better to try to invoke also the other side into one's argumentation.

It is also clear that cultural property and the debate surrounding it cannot be free of infusion with politics and other such secular issues. As something extremely valuable and emotive, it is unavoidable that actors in the debate will consider every advantage that cultural property can have. Obvious are the economic gains for even an entire nation when they can hold iconic pieces of cultural property, but irrefutable are also the myriad of political uses that cultural property can have – be it gaining popularity, invoking communal emotion, populist rhetoric or shining a spotlight away from things one wishes to hide. There are also countless ways to interpret the matters surrounding the debate – to one displaying cultural property is a grand celebration of the achievements of humanity, to another it is an expression of imperialism. That is due to the indeterminate nature of both cultural property and imperialism.

The discussion also is highly unlikely to disappear. Nations are not going to give up trying to secure what they feel is their cultural heritage and property that belongs to them, and no one can also deny the advantages (for everyone) that the universal museums have. The debate will also follow along the same paths, as made sure by the argument patterns that strongly reflect those that can be found in international law as presented by Koskeniemi. It is almost surprising how strongly the discourse in cultural property functions like the international law discourse, with, for example, clear arguments of apology and utopia and the reversibility of arguments. Although in some ways the cultural property debate is a part of the international law discourse, this parallel cannot alone explain why the debate functions in the same way also on the non-legal side. The full debate is also alike in that it pits against each other principles that are, in fact, useable for either side of the debate, features the conflict of sovereign power and perceived higher moral principles and shares some similarities in the historical development of the liberal view, such as the (attempted) escape from politics. Perhaps the biggest difference is simply in the fact that in cultural property debate, the principles stay the same, and those who argue for them rarely change perspectives, unlike international lawyers.

A paradigm shift may be needed in order to steer away from this endless argumentation cycle in cultural property debate, but whether such a change is needed is another matter. Perhaps not – although as the discussion is now, due to the emotional impact of cultural property on peoples everywhere, it does create negativity between those who possess these objects and those who want them back. But since both sides already lean on both types of arguments, perhaps there is some hope of a middle-ground being found. According to Koskeniemi, the argumentation cycle in international law can only be ended by applying external facts into the case. In the matter of cultural property debate, such a change may perhaps be brought on by approaching cultural property overall from a different angle.

In recent decades – to some degree starting with UNESCO 1970 – the scales have been balancing more in favor of cultural nationalism, the restitution movement and especially the rights of indigenous peoples to their cultural property. Usually parties try to avoid taking the cases to court, as the process would be extremely expensive and cumbersome, and the resulting judgment somewhat unpredictable. That is why, for example, mediation and other modes of alternative dispute resolution have been brought forth and preferred as a better alternative.³⁸⁹ However, as some of the cases as well as the presented alternative approaches have shown, there is good hope for ways completely outside the legal system to settle such disputes. The Icelandic Manuscripts case was settled through diplomatic negotiations, and as the American museums' new pragmatic approach has shown, there is a possibility to find a middle-ground between the interests of the restitutionists and retentionists, or nationalists and internationalists. If such a middle-ground were to be found through improved co-operation between the different actors – museums, nations, communities etcetera – and the required goodwill and trust found, it could mean benefits for everyone involved, as well as the chance for the requirements of both parties to be met. For example, loan programs could mean both that the iconic works of a certain culture, currently on display in a foreign nation, would be available on display in its home culture, and that works could be allowed to tour the world so that the cultural property is accessible to all the people in the world, as required by cultural internationalism. But perhaps true change to the debate can only be achieved through a complete shake-up of the fundamentals of the concept of cultural property.

³⁸⁹ See for example Mealy, 2011; Cornu & Renold, 2010; Ounanian, 2007